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WHAT POLICE LEARN FROM LAWSUITS

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This Article asks what we can learn from the vast amount of information generated by modern civil litigation. One answer lies in the practices of a small but growing number of law enforcement agencies that pay careful attention to suits brought against them and their officers. These departments gather information from initial complaints, discovery, and case resolutions and use that information to identify personnel and policy weaknesses. Lawsuit data has proven valuable to these departments' performance improvement efforts: Suits have alerted departments to incidents of misconduct, and the information developed during the course of discovery and trial has been found to be more comprehensive than that generated through internal channels. Although information generated by litigation has filled gaps in internal reporting systems it is also, undeniably, flawed. The adversarial process produces biased and sometimes irrelevant information about a relatively small number of misconduct allegations, and the slow pace of litigation means that a case may not be resolved until several years after the underlying event. Departments in my study mitigate these flaws by gathering information from each stage of the litigation process, reviewing data in context with other available information, and using independent auditors to consider what the data may show. Department practices take advantage of the strengths – while minimizing the weaknesses – of lawsuit data and thereby suggest a promising way to learn from litigation.

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INTRODUCTION

Contemporary civil litigation produces massive amounts of highly imperfect information. The complaint that initiates each lawsuit[1] will describe why the plaintiff believes she has been wronged and the people and events that caused those legal violations.[2] Assuming the plaintiff prevails against any motion to

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[1] Although each lawsuit produces a large amount of information, most aggrieved people never sue. For a discussion of low filing rates' impact on the usefulness of lawsuit data to performance improvement efforts, s*ee infra* note 179 and accompanying text.

[2] Although Rule 8 requires only a "short and plain" statement of facts and claims, the Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* – which require plaintiffs to present a "plausible" claim for relief in their complaint – lead prudent plaintiffs' attorneys to submit detailed initial pleadings. For a description of pleading's evolving standards, *see* Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821 (2010); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.

dismiss, the pre-trial litigation process is dominated by the production and exchange of information.[3] In federal court and the majority of states that follow the federal rules of civil procedure,[4] parties must disclose witnesses and documents that support their claims and defenses.[5] Each side can demand any document from the opposing party – emails, bills, memos, medical records, diaries, personnel manuals, and the like – that "appears reasonably calculated to lead to the discovery of admissible evidence."[6] Each side can demand written answers to interrogatories and requests for admission.[7] Each side can depose witnesses, subject to minimal objections or limitations on the scope of questioning.[8] And attorneys, if they are zealously representing their clients, use these discovery tools to squeeze all the plausibly relevant information they can from the opposing side's file cabinets, computer hard drives, and witnesses' memories. Although the vast majority of cases are resolved through settlement or motion practice,[9] trial can produce yet more information, as attorneys introduce evidence and question witnesses about the merits of legal claims.

J. 1 (2010). For a discussion of the effects of *Twombly* and *Iqbal* on pleading practice, *see* Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 527-37 (2010).

[3] Thomas E. Willging, Donna Stienstra, John Shapard, Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 543-44 (1998) (finding that 85% of attorneys surveyed reported engaging in some form of discovery in a recent closed case). For a discussion of the changing focus in civil litigation from trial to pre-trial litigation over the past century, *see* Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919 (2009); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WISC. L. REV. 631 (1994);

[4] *See* John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 30 Nev. L. J. 354 (2002/2003) (finding that thirty-three states have adopted the federal rules or very similar rules). Over the past fifteen years, states have increasingly experimented with their own procedural rules, particularly those governing discovery. *See* Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Justice Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167 (2005).

[5] Fed. R. Civ. P. 26(a). State procedural rules generally require each side to disclose additional information. For a description of mandatory disclosure provisions across the country, *see* Koppel, *supra* note 4 at 1226-34; Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 RUTGERS L. REV. 595, 640-41 (2002) (describing state mandatory disclosure provisions).

[6] Fed. R. Civ. P. 26(b)(1), 34.

[7] Fed. R. Civ. P. 33, 36. For a survey of various state procedural requirements for interrogatories and requests for admission, *see* Koppel, *supra* note 4 at 1216-21.

[8] Fed. R. Civ. P. 30.

[9] *See* Clermont, *supra* note 3 at 1954-55 (2009) (finding that, of the federal cases terminated in 2005, 67.7% were settled, 20.7% were adjudicated by motion, and just 1.3% were adjudicated at trial – the remaining 10.3% were generally transferred or remanded).

We know little about the ways that complex organizations process the dizzying amount of data generated by litigation. Lauren Edelman and Charles Weisselberg have studied how legal rules are disseminated in companies' personnel offices and police department station houses, respectively.[10] Margo Schlanger recently studied the ways that claims management systems, developed in response to the threat of litigation, can be used to improve organizational behavior in hospitals, retailers, and prisons.[11] But we know almost nothing about how complex organizations gather and analyze information from lawsuits that have been filed against them and their employees.[12]

My research of law enforcement uses of litigation data aims to fill this gap. In a previous study, I found that few police departments learn from lawsuits brought against them.[13] Officials may pay attention to lawsuits that lead to large judgments or political repercussions. But most departments ignore lawsuits that do not inspire front-page newspaper stories, candlelight vigils, or angry meetings with the mayor. The city attorney will defend these suits, any settlement or judgment will be paid out of the city's coffer, and the department will not keep track of which officers were named, what claims were alleged, what evidence was amassed, what resolution was reached, or what amount was paid.[14]

This Article examines the practices of a small group of police departments that *do* consistently gather and analyze information from lawsuits filed against them and their officers.[15] I have studied five departments – the Los Angeles Sheriff's Department and police departments in Seattle, Portland, Denver, and Chicago – that gather and analyze legal claims, information generated during

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[10] For representative work by Lauren Edelman and her colleagues regarding the dissemination of legal rules though personnel offices, *see, e.g.*, Lauren B. Edelman, Sally Riggs Fuller & Iona Mara-Drita, *Diversity Rhetoric and the Managerialization of Law*, 106 Am. J. Soc. 1589 (2001); Lauren B. Edelman & Mark C. Suchman, *When the "Haves" Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC'Y REV. 941 (1999). For work regarding the dissemination of legal rules in police departments, *see* Charles Weisselberg, *In the Stationhouse After* Dickerson, 99 MICH. L. REV. 1121 (2001).

[11] *See* Margo Schlanger, *Operationalizing Deterrence: Claims Management (In Hospitals, a Large Retailer, and Jails and Prisons)*, 2 J. TORT L. 1 (2008). *See also* Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377 (1994) (studying the effects of threat of litigation in several contexts).

[12] Apart from my research, *see* GEORGE EADS & PETER REUTER, DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION 105-06 (1983).

[13] *See* Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. Rev. 1023 (2010).

[14] For a description of these findings, *see* Schwartz, *supra* note 13.

[15] *See infra* Part I.A for a description of the data and methodology of this study.

discovery, and litigation outcomes.[16] These departments use lawsuit data – with other information – to identify problem officers, units, and practices. They explore personnel, training, and policy issues that may have led to the claims. And they craft interventions aimed at remedying those underlying problems.

For these departments, lawsuits are a valuable source of information about police misconduct allegations. Departments that do not gather lawsuit data rely on civilian complaints and use-of-force reports to alert them to possible misconduct. In the litigation-attentive departments in my study, lawsuits have notified officials of misconduct allegations that did not surface through these other reporting systems. For example, the Los Angeles Sheriff's Department's review of lawsuit claims revealed clusters of improper vehicle pursuits, illegal searches, and warrantless home entries.[17] These vehicle pursuits, searches, and home entries did not appear in officers' use-of-force reports because the events – while potentially serious constitutional violations – did not involve the application of force as defined by department policies and so did not trigger reporting requirements.[18] The civilians involved in these lawsuits could have chosen to file civilian complaints but did not; people rarely file civilian complaints and may be particularly unlikely to do so if they are planning to sue.[19]

Even when a civilian complaint or use-of-force report is filed, the litigation process can unearth details that did not surface during the internal investigation. When, for example, a man died of blunt force chest trauma two hours after being taken into Portland police custody, a critical question was how much force the involved deputies had used to bring him to the ground.[20] The night of the man's death, the involved officer and deputy were videotaped at the Portland jail describing their confrontation.[21] The audio portion of the tape was very scratchy, but Portland's internal affairs investigators did nothing to improve the sound.[22] Only during litigation did plaintiff's counsel enhance the audio, at which point the involved officer's statements were found to contradict his statement to internal affairs.[23]

Although lawsuits have filled critical gaps in police department internal reporting systems, lawsuits are themselves flawed sources of information. Aggrieved parties rarely file lawsuits and, when they do, plaintiffs win and lose for reasons – and are compensated at amounts – divorced from the merits of their

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[16] For further description of department practices, *see infra* Part I.C.

[17] *See infra* note 149 and accompanying text.

[18] *See infra* note 150 and accompanying text.

[19] *See infra* notes 129-30 and accompanying text.

[20] *See* OIR Group, Michael Gennaco, Robert Miller & Julie Ruhlin, *Report to the City of Portland Regarding the In-Custody Death of James Chasse* 8 (2010) [hereinafter Chasse Report].

[21] *See id.* at 27.

[22] *See id.*

[23] *See id.* at 27-28.

claims. Cases drag on for years and are often brought against individual bad actors instead of the institutional players best positioned to address systemic harms. This Article does not contest these critiques. Instead, it shows that departments mitigate lawsuits' flaws by gathering information from each stage of the litigation process, reviewing data in context with other available information, and using independent investigators and auditors to consider what the data may show.

This Article not only describes how a group of police departments process information from lawsuits; it also enriches our understanding of the relationship between lawsuits and performance improvement. Courts and scholars expect that negative litigation outcomes deter misbehavior.[24] Scholars who think about the deterrent effects of lawsuits against the police disagree about whether police officials will be deterred by lawsuits' financial, political, administrative, or emotional effects.[25] But all expect that it is lawsuits' punitive nature that inspires performance improvement.

Although high-profile cases and large damages awards may inspire behavior change, my research reveals that deterrence does not function as expected when it comes to run-of-the-mill damages actions. My prior study showed that most departments collect so little information about lawsuits brought against them that they cannot weigh the costs and benefits of future misconduct as deterrence theory assumes.[26] This Article shows that when departments pay attention to

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[24] For foundational descriptions of this theory, *see* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: AN ECONOMIC ANALYSIS; WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987); STEVEN SHAVELL, THE ECONOMIC ANALYSIS OF ACCIDENT LAW (1987); A.MITCHELL POLINSKY, AN INTRODUCTION TO LAW & ECONOMICS (2003). For a description of the history of the economic theory of tort law – at least until 1980 – *see* William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 852-57 (1980-1981). Scholars have long recognized that deterrence in its strongest form cannot be found in the real world. Boundedly rational decisionmakers with imperfect information cannot weigh costs and benefits with the precision relied upon by formal models. *See* Schwartz, *supra* note 13 at 1026-27 for a description of these criticisms.

[25] *See, e.g.*, Richard H. Fallon, Jr., & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional* Remedies, 104 HARV. L. REV. 1731 (1991) (arguing that government officials respond to financial incentives); PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS (1983) (arguing that government officials respond to political, bureaucratic, and administrative incentives); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000) (arguing that government officials respond to political incentives); Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845 (2001) (arguing that government officials respond to negative publicity).

[26] *See* Schwartz, *supra* note 13.

lawsuits they do so in ways also distinct from prevailing theories of deterrence. Departments mine lawsuits for data about misconduct allegations and the details of those allegations. Lawsuits promote performance improvement not because they have political or financial ramifications, but because the information generated by litigation offers valuable insights about police practices. These five departments have found an original, productive, and promising way to learn from litigation.

The remainder of the Article proceeds as follows. In Part I, I describe my study and findings. In Part II, I show that lawsuits offer departments otherwise unavailable information about the occurrence of alleged misconduct and details of those events. In Part III, I examine the weaknesses of lawsuit data and show how department practices mitigate these flaws. And, in Part IV, I show how department practices complicate and enrich our understanding of the role of lawsuits in performance improvement efforts and explore how other institutions might adopt their approach.

I. STUDY

A. Overview

Most police departments ignore lawsuits, but a small but growing number of departments have begun to review lawsuit claims and evidence for possible lessons.[27] Some began doing so as conditions of settlements of cases alleging department-wide failures brought by the Department of Justice, state attorneys general, and individuals.[28] Other cities have hired independent investigators or auditors who analyze litigation data as part of their efforts to improve police accountability.[29] Technological problems, human error, and intentional efforts to obfuscate can frustrate data collection and analysis.[30] But when departments with policies to gather information from lawsuits overcome these implementation problems, lawsuits inform training and policy decisions that, in turn, appear to improve performance and decrease misconduct.[31]

In this study, I focus on five departments – in Los Angeles County, Portland, Denver, Seattle, and Chicago – that systematically integrate information from lawsuits into decisions aimed at improving officer and department performance. These departments are in no way typical; I make no claims that their practices are representative of departments more generally. Indeed, I contend that these departments are outliers. These five departments review litigation data most

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[27] For a description of these findings, *see generally* Schwartz, *supra* note 13.
[28] *See* Schwartz, *supra* note 13 at 1057-58.
[29] *See id.* at 1057-58.
[30] *See id.* at 1060-64.
[31] *See id.* at 1068-71.

extensively as a matter of policy[32] and most consistently as a matter of practice.[33]

Each of these five departments has an independent investigator or auditor that evaluates department policies and practices, and reviews lawsuit data for possible lessons. I read reports by these reviewers about the inner-workings of their departments.[34] I then used those reports as a backdrop for semi-structured

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[32] Although there has been no national study of the extent to which police departments use litigation data, experts estimate that the number is quite small. Two-thirds of large police departments do not have early intervention systems that track information about officers. *See* Schwartz, *supra* note 13 at 1059. And even departments with early intervention systems may not necessarily track civil claims. *See id.* Even fewer departments appear to use lawsuit data for other purposes. In 2007, the Police Assessment Resource Center, which regularly evaluates police departments' practices, commended a small department for "being among the vanguard of departments nationwide that routinely conduct an Internal Affairs investigation when the municipality receives a claim or lawsuit that alleges wrongdoing by a member of its police department." RICHARD JEROME, POLICE ASSESSMENT RES. CTR., PROMOTING POLICE ACCOUNTABILITY AND COMMUNITY RELATIONS IN FARMINGTON: STRENGTHENING THE CITIZEN POLICE ADVISORY COMMITTEE 76 (2007). Beyond those departments that have been subject to consent decrees, or have a police auditor, most departments do not seem to engage in this analysis. *See* Correspondence with Oren Root, Deputy Dir., PARC (Dec. 17, 2008) (on file with author). And only a very small number of jurisdictions – a subset of the two dozen or so departments with police auditors or under court supervision – appear to review closed litigation files or the results of cases for any purpose. *See id.*

[33] Twenty of the twenty-six departments in my prior study had policies to integrate information from lawsuits into their personnel and policy decisions. *See* Schwartz, *supra* note 13 at 1052-56; *see also id.* at 1057-58 (explaining why a disproportionately large number of departments in my study have these types of policies). Reports about these twenty departments revealed several recurring impediments that have delayed, compromised, and defeated efforts to gather, analyze, store, and communicate information from lawsuits. For descriptions of these implementation problems, *see* Schwartz, *supra* note 13 at 1060-66. The five departments in this study have also struggled to follow their own policies. *See id.* Yet, I also found evidence that these five departments' policies are, relatively speaking, in working order: These departments input information into relevant systems, analyze that information, and craft interventions based on their analysis.

[34] Merrick Bobb, the Special Counsel to the Board of Supervisors, has written twenty-nine semi-annual reports about the Los Angeles Sheriff's Department and eight annual reports have been written about the LASD by the Office of Independent Review, available at www.parc.info and www.laoir.com, respectively. The Seattle Office of Professional Accountability has published twelve semi-annual reports, available at http://www.seattle.gov/police/OPA/publications.htm. Chicago's Independent Police Review Authority publishes annual and quarterly reports, available at http://www.iprachicago.org/resources.html. The Denver Office of the Independent Monitor publishes quarterly and annual reports available at http://www.denvergov.org. And Portland's Independent Police Review Division publishes annual and quarterly reports in addition to reports dedicated to particular issues, available at http://www.portlandonline.com/auditor/index.cfm?c=27068.

interviews with past and current auditors and investigators, their staff members, and department officials.[35]

B. Departments

Following are descriptions of the five departments in this study, listed in the order in which they instituted policies to gather and analyze litigation data.

Los Angeles County. The Los Angeles Sheriff's Department (LASD) is the largest sheriff's department and the fourth largest law enforcement agency in the country. Its almost 8300 sworn officers patrol over 3,000 square miles of Los Angeles County and run the country's largest jail system. Although the LASD has among the most extensive systems of accountability, and pays the most attention to the lessons that lawsuits might offer, it did not establish these policies on its own initiative. Instead, in 1991, following a series of high profile events and costly legal settlements and judgments, the Los Angeles County Board of Supervisors called for an independent investigation of the department under the leadership of retired Superior Court Judge James Kolts ("Kolts Commission).[36]

In July 1992, the Kolts Commission issued a "damning" report with recommendations aimed at improving reporting and review of lawsuits and other misconduct allegations, and making more effective policy, training, and discipline

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[35] *See* Telephone Interview With Mary-Beth Baptista, Director, Portland Independent Police Review (December 3, 2010); Telephone Interview With Merrick Bobb, Founding Director, PARC, and Special Counsel, L.A. Sheriff's Dep't, and Oren Root, Deputy Dir., PARC (Oct. 24, 2007); Telephone Interview With John Fowler, Associate Director, Seattle Office of Prof'l Accountability (Oct. 16, 2008); Telephone Interview with Craig Futterman, Univ. of Chi. Law Sch. (Sept. 15, 2008); In-Person Interview with Michael Gennaco, Chief Attorney, L.A. Sheriff's Dept Office of Independent Review (Sept. 18, 2010); Telephone Interview with Captain Shaun Mathers, Captain, L.A. Sheriff's Dep't Risk Management Unit (Sept. 27, 2010); Telephone Interview with Kathryn Olson, Director, Seattle Office of Prof'l Accountability (Aug. 30, 2010); Telephone Interview With Richard Rosenthal, Indep. Monitor, City and County of Denver & former Police Auditor, City of Portland (Sept. 18, 2008); Telephone Interview with Ilana Rosenzweig, Chief Admin'r, Chi. Indep. Police Review Auth. (Sept. 15, 2008).

[36] *See* JAMES G. KOLTS ET AL., LOS ANGELES COUNTY SHERIFF'S DEPARTMENT 1 (1992) [hereinafter KOLTS COMMISSION REPORT] (asserting that the Kolts Commission inquiry was prompted by "an increase over the past years in the number of officer-involved shootings," "four controversial shootings of minorities by LASD deputies in August 1991," and the fact that "Los Angeles County ("the County") had paid $32 million in claims arising from the operation of the LASD over the last four years"). Merrick Bobb served as General Counsel to the Kolts Commission. *Id.*

decisions.[37] Following the Kolts Commission's recommendations, the LASD created three new entities to identify and manage information and to audit internal practices. First, the Board of Supervisors appointed Merrick Bobb to succeed Judge Kolts as Special Counsel to the Board, and charged him with overseeing the implementation of the Kolts Commission's recommendations.[38] Bobb reviews department policies and practices, reviews the department's litigation trends and costs, reviews closed litigation files for policy implications, and provides semi-annual reports to the Board about the LASD.[39] Bobb's original contract was for three years, but the contract has been successively renewed and he has been reporting to the Board of Supervisors ever since. His reports, each of which regularly is more than 100 pages, may be the most extensive and detailed analysis available of a police department's efforts at creating systems of accountability.

Second, following the Kolts Commission's recommendations, the LASD created a risk management bureau, the first law enforcement bureau in the country dedicated to reducing preventable accidents and liability costs.[40] The bureau directs administrative investigations of claims when they are filed, identifies trends across claims, and reviews closed case files for possible lessons. The bureau also maintains an early intervention system that tracks information, including lawsuits, in an effort to identify problem officers. Third, at the recommendation of the Sheriff's Department, the Board of Supervisors created the Office of Independent Review (OIR); a civilian body separate from the department's internal affairs division that is charged with overseeing and participating in the LASD's internal investigations.[41]

Seattle. Seattle has a population of 560,000 with 1,240 sworn officers.[42] In 1999, after a high-profile scandal,[43] a civilian panel was appointed to study the police department's internal investigation processes. Based on the panel's recommendations, the department appointed a civilian director of the internal

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[37] MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, FIRST SEMI-ANNUAL REPORT 35 (1993) [hereinafter LASD FIRST SEMI-ANNUAL REPORT].

[38] MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, FOURTEENTH SEMI-ANNUAL REPORT 55 (2001) [hereinafter LASD FOURTEENTH SEMI-ANNUAL REPORT].

[39] *Id.* at 55-56.

[40] *See* MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, THIRD SEMI-ANNUAL REPORT at 12, 14 (Dec. 1994).

[41] *See* OFFICE OF INDEP. REVIEW, COUNTY OF L.A., FIRST REPORT ii (2002) [hereinafter OIR FIRST REPORT].

[42] SAMUEL WALKER, REVIEW OF NATIONAL POLICE OVERSIGHT MODELS 19 (2005) [hereinafter NATIONAL POLICE OVERSIGHT MODELS].

[43] *See* Jim Brunner, *New System in Place for Policing the Police*, SEATTLE TIMES (May 7, 2002) (describing the scandal, in which a homicide detective stole $10,000 from the home of a dead man, and at least eighteen police officials knew of the incident but no internal investigation ever took place).

affairs unit, called the Office of Professional Accountability (OPA).[44] The OPA director reviews civilian complaints and lawsuits and investigates the most serious claims.[45] The OPA director additionally tracks lawsuit data in an early intervention system, reviews suits for trends across cases, and reviews closed case files.[46] The department has two additional forms of oversight; an auditor who reviews complaints and OPA investigations and a citizen panel that reviews closed OPA investigations.[47]

Portland. Portland has a population of approximately 537,000, and a police force of 1,050. In 2001, the Portland City Council approved the creation of an independent auditor, the Independent Police Review Division (IPR), to receive civilian complaints, refer complaints to internal affairs for investigation, review internal affairs' investigations, and conduct independent and joint investigations.[48]

In 2004, the IPR director, Richard Rosenthal, recommended that the IPR begin reviewing and investigating lawsuits in the same manner that it reviewed civilian complaints.[49] The mayor opposed the proposal, arguing that internal investigations would be "a violation of . . . fiduciary responsibility" to the city's taxpayers because the findings of these investigations might lead to higher payouts.[50] The chief of police argued it was the job of the city attorney, not the police auditor, to investigate lawsuits.[51] The Portland City Council agreed with Rosenthal and allowed him to investigate lawsuit claims.[52] Portland's auditor reviews legal claims when filed, identifies those claims that have not previously been brought as civilian complaints, and internally investigates the most serious

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[44] *See id.*

[45] *See* NATIONAL POLICE OVERSIGHT MODELS, *supra* note 42 at 19.

[46] *See* Telephone Interview with John Fowler, *supra* note 35.

[47] Brunner, *supra* note 43; NATIONAL POLICE OVERSIGHT MODELS, *supra* note 42 at 19.

[48] INDEP. POLICE REVIEW DIV., OFFICE OF THE CITY AUDITOR, THE CITY OF PORTLAND'S HANDLING OF TORT CLAIMS ALLEGING POLICE MISCONDUCT: A NEED FOR CONSISTENT REFERRALS TO THE INTERNAL AFFAIRS DIVISION 7 (2004) [hereinafter PORTLAND TORT CLAIMS REPORT].

[49] Prior to 2004, the Portland Police Bureau "generally did not review or investigate tort and civil rights claims for disciplinary action unless the complaining party also filed a citizen complaint." Portland actually had a city ordinance preventing internal investigations while a lawsuit was pending. *See id.* at 3.

[50] Letter From Vera Katz, Mayor, Portland, Or. to Gary Blackmer, City Auditor, Portland, Or. (Aug. 26, 2004) (on file with author).

[51] *See* Letter From Chief Derrick Foxworth, Portland Bureau of Police to Gary Blackmer, City Auditor, Portland, Or. (Aug. 27, 2004) (on file with author).

[52] *See* Telephone Interview With Richard Rosenthal, supra note 35; Portland, Or. City Code ch.3.21 § 110(B) (codification of ordinance allowing the IPR to investigate tort claims).

claims.[53] The auditor looks for trends across claims and reviews closed case files after the litigation is complete.[54]

Denver. Denver has a population of 566,000, and a police force of 1,405. Denver's City Counsel created the Office of the Independent Monitor (OIM) in 2004, and, in 2005, Richard Rosenthal left his post as Portland's auditor to become Denver's OIM Director.[55] The OIM, an entity independent of internal affairs, oversees internal affairs investigations and makes personnel recommendations to the chief of police.[56] When Richard Rosenthal joined Denver's OIM, he begin reviewing all tort claims and investigating the underlying allegations when appropriate. Rosenthal additionally reviews claims for trends.[57]

Chicago. Chicago has a population of 2.8 million, and employs over 13,000 uniformed officers. In 2007, after a series of scandals, Chicago created an independent investigative agency, the Independent Police Review Authority (IPRA), to investigate police misconduct allegations.[58] The civilian appointed to head the division, Ilana Rosenzweig, was previously an attorney at LASD's OIR.[59] Rosenzweig investigates legal claims and reviews closed litigation files to determine whether internal investigations should be reopened.[60]

C. Policies

The Los Angeles Sheriff's Department and the police departments in Se-

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[53] *See* Telephone Interview with Mary-Beth Baptista, *supra* note 35.

[54] *See, e.g.*, Eileen Luna-Firebaugh, *Performance Review of the Independent Police Review Division* 86 (2008).

[55] DENVER OFFICE OF THE INDEPENDENT MONITOR, FIRST ANNUAL REPORT (2005).

[56] *Id.*

[57] *Id.*; Telephone Interview with Richard Rosenthal, *supra* note 35.

[58] Libby Sander, *Chicago Revamps Investigation of Police Abuse, but Privacy Fight Continues*, N.Y. TIMES (July 20, 2007) (describing the "string of scandals" as follows: "An off-duty officer was caught on videotape beating a female bartender. In another incident, also captured on videotape, a group of off-duty officers was seen beating four businessmen at a downtown bar. In addition, several officers in an elite unit are awaiting trial on charges that include home invasion, theft and armed violence, as county prosecutors continue to investigate the unit.") IPRA investigates "allegations of the use of excessive force, police shootings where the officer discharges his/her weapon and strikes someone, deaths in custody, domestic violence, verbal abuse including bias and coercion." *See* About IPRA, available at http://www.iprachicago.org/about.html. Other misconduct claims are investigated by Chicago's internal affairs division.

[59] *See* Telephone Interview With Ilana Rosenzweig, *supra* note 35.

[60] *See id.*

attle, Portland, Denver, and Chicago gather information from lawsuits brought against them and their officers at each stage of the litigation process. Departments use this data to understand individual incidents of alleged misconduct and to identify trends across cases that suggest widespread personnel and policy failings. I describe these policies here:[61] In Part II I will consider the extent to which lawsuit data adds value to department performance improvement efforts and in Part III I will describe how these departments minimize the data's flaws.

1. Trend Analysis

All five departments review legal claims in the aggregate to identify trends that suggest problem units and types of behavior.[62] Departments' trend analysis varies in its depth and rigor. Some departments maintain a computerized database of lawsuits and perform sophisticated analyses of the data;[63] others identify trends by "trying to pay attention."[64] In each department, officials periodically review the legal claims pending against the department and its officers and consider whether a cluster of similar cases merit closer scrutiny and, possibly, intervention.[65]

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[61] *But see infra* note __ (observing that these departments do not always follow their own policies).

[62] There is no national data about the prevalence of this type of trend analysis. The statistics about the prevalence of early intervention systems can offer some guidance, given that trends are sometimes identified through early intervention systems. See Schwartz, *supra* note 13 at 1059. Yet, statistics about national use of early intervention systems should not be relied heavily upon. Departments may not use their early intervention systems for this purpose. And other departments – including Chicago, Seattle, Denver, and Portland – conduct some manner of trend analysis without a computerized system. See Telephone Interview with Ilana Rosenzweig, *supra* note 35; Telephone Interview with John Fowler, *supra* note 35; Telephone Interview with Richard Rosenthal, *supra* note 35. Finally, departments with policies to review lawsuits for trends may not do so in practice. Those departments reliant upon early intervention systems for their trend analyses will suffer from the same technological problems, errors, and incomplete information described *infra* notes 94-95 and accompanying text. And department officials that look for trends without computerized assistance may experience difficulties identifying trends, *see* Schwartz, *supra* note 13 at 1063.

[63] *See* MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, SEVENTH SEMI-ANNUAL REPORT 56 (1997) [hereinafter LASD SEVENTH SEMI-ANNUAL REPORT].

[64] *See* Telephone Interview with Richard Rosenthal, *supra* note 35.

[65] *See* Telephone Interview with Shaun Mathers, *supra* note 35 (describing that, when a claim is filed against the Los Angeles Sheriff's Department, the risk management bureau has the involved station investigate the allegations. The risk management bureau then reviews the completed claim file in conjunction with other claims to determine whether the incident is part of a trend); Maxine Bernstein, *Portland Officials Call for Overhaul of Police Oversight*, The Oregonian (Mar. 10, 2010) (describing Portland's Tort Claim Review Board, a group of city risk managers, police personnel, and city attorneys

By reviewing lawsuits as a group, departments can identify problems that would not have been apparent had they reviewed each case individually. As the director of the Los Angeles Sheriff's Department's risk management bureau explained:

> There's times when [the station] thinks it's a single incident but when we get it we know that we've had two or three or whatever number there are. . . . An example of that is one that we have from our jails where inmates would go to the doctor and for some medical reason the doctors would hand them a note to have a bottom bunk in the jail. They would then go to an outlying custody facility and . . . [t]he outlying custody facility had no access to those records and so when the inmate got there they would say "get on the top bunk," you know, "that's where you're assigned," and you know something would happen, they would fall and get hurt. Well, each unit, from two or three units we got claims individually. They couldn't see the problem but by having it centralized in our operation we were able to say "we're seeing a pattern here, a problem across all the units and it's a communication issue," and had our custody division work on that. . . . [Y]ou know a station sees a tree . . . I get the benefit of the forest.[66]

Departments have repeatedly found clusters of troublesome incidents by reviewing groups of legal claims. In addition to the claims brought by inmates who had fallen off their top bunks, the LASD has found clusters of claims relating to the transporting and searching of inmates,[67] vehicle pursuits,[68] and deputies' failure to go to the correct address in response to a call.[69]

Once these departments identify a trend, officials diagnose and correct the underlying problem. LASD's auditor recommended policy changes to address the problems transporting and searching inmates,[70] and enhanced supervision to improve vehicle pursuits and accuracy when responding to calls.[71] When the Portland auditor observed a cluster of claims suggesting that officers did not understand their authority to enter a home without a warrant, the City Attorney's office made a training video on this issue, and it "nearly disappeared as a

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who meet monthly to review tort claims against the city); Telephone Interview with Richard Rosenthal, *supra* note 35; Telephone Interview with Ilana Rosenzweig, *supra* note 35; Telephone Interview with John Fowler, *supra* note 35.

[66] Telephone Interview with Captain Mathers, *supra* note 35.

[67] *See* LASD SEVENTH SEMI-ANNUAL REPORT, *supra* note 63 at 55-56.

[68] *See id.*

[69] OFFICE OF INDEP. REVIEW, COUNTY OF L.A., SECOND ANNUAL REPORT 40-41 (Oct. 2003) [hereinafter OIR SECOND ANNUAL REPORT].

[70] *See id.*

[71] *See id.*

problem."[72]

Just as clusters of initial filings suggest troublesome practices, settlement and judgment trends can identify underperforming stations in the department. The Los Angeles Sheriff Department's special counsel semi-annually reviews trends in department settlements and judgments.[73] In one review, the special counsel found that two of the department's twenty-three stations[74] – Century and Lenox – were responsible for 70% of the police misconduct litigation and 60% of the settlement dollars paid over a six-month period.[75] He then investigated Century station, which the special counsel considered to be "LASD's most troubled station."[76] Special counsel's team

> spent several weeks stretched over five months at the station, reviewing documents, interviewing station management, speaking with deputies, learning about the community, and gathering facts. We also rode along with deputies on patrol and "flew along" with a helicopter crew that provides air support to LASD patrol operations. We engaged a police officer, who had worked in the two

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[72] Luna-Firebaugh, *supra* note 54 at 86.

[73] Other departments in this study do not conduct this type of analysis. Richard Rosenthal, Denver's auditor, recently requested that the department begin to collect "how much money has been paid out by the Police and Sheriff's Departments, based on allegations of misconduct, over the course of the past few years," and despaired of the fact that "the Department of Safety has no data information in this regard and has no tools to identify trends in litigation which could be used to identify, on a systemic basis, where training resources or policy reviews would be best used." DENVER OFFICE OF THE INDEPENDENT MONITOR, ANNUAL REPORT 2009 at 5-8 (2009).

[74] *See* Los Angeles Sheriff's Department, LASD Family, *available at* http://sheriff.lacounty.gov/wps/portal/lasd/family; Los Angeles County Sheriff's Department General Phone numbers, *available at* http://www.lasdhq.org/lasd_services/lasd_gnrlphone_no.html

[75] LASD SEVENTH SEMI-ANNUAL REPORT, *supra* note 63 at 52-53. The auditor also observed that these stations were responsible for a disproportionate number of "significant force events," shootings, and civilian complaints, and that "stations in equally tough neighborhoods have a much better record on controlling shootings, force, and litigation." *Id.* at 53.

[76] *See* MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, THIRTEENTH SEMI-ANNUAL REPORT 9 (2000) [hereinafter LASD THIRTEENTH SEMI-ANNUAL REPORT]. Bobb also considered Century Station to be "a microcosm of American policing in inner city, crime-ridden, minority neighborhoods." MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, FIFTEENTH SEMI-ANNUAL REPORT 1 (2002) [hereinafter LASD FIFTEENTH SEMI-ANNUAL REPORT]. This investigation was presented not only as an audit of the department, but also a means of examining LASD policies implemented as a result of the Kolts Commission report. *See* MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, NINTH SEMI-ANNUAL REPORT 7-8 (1998) [hereinafter LASD NINTH SEMI-ANNUAL REPORT].

> south Los Angeles Police Department stations adjoining Century, to work with three of our team members and help us interpret what we saw.[77]

Special counsel found that the station – one of the most active in the department – had too many rookies, used inexperienced deputies as trainers, had too few senior administrators, and had too few African-American and Spanish-speaking deputies.[78] The special counsel recommended that the station employ fewer rookies at any given time, encourage training officers to stay in their positions so that they could become more experienced, encourage senior personnel to remain at Century station, decrease the sergeant-to-patrol deputy ratio, and increase staff diversity.[79] Special counsel also recommended additional training and policy changes to reduce shootings by Century station deputies.[80] When special counsel reviewed Century Station two years later, he found that the number of shootings at the station had dropped dramatically, even as the crime statistics and arrests remained stable.[81]

2. Investigations of Claims

The five departments in this study view each lawsuit as a "civilian complaint plus a demand for money."[82] In other words, departments review and investigate misconduct claims in a lawsuit the same way they would were the claims alleged in a civilian complaint. Parties sometimes refuse to participate in an internal investigation while a lawsuit is pending.[83] As a matter of policy, however, the internal investigation is meant to proceed simultaneous with, but independent of, the litigation.[84]

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[77] LASD NINTH SEMI-ANNUAL REPORT, *supra* note 76 at 9.

[78] *Id.* at 8.

[79] *Id.* at 9.

[80] *Id.* at 17-26.

[81] While Century Station was, in 1997, responsible for 60% of the shootings by deputies, two years later it was responsible for only 10% of the shootings. *See* LASD THIRTEENTH SEMI-ANNUAL REPORT, *supra* note 76 at 11. Two years later, Bobb found that these downward trends had reversed themselves as the Department was less committed to its risk management efforts: uses of force and shootings increased throughout the Department, but particularly at Century Station. LASD FOURTEENTH SEMI-ANNUAL REPORT, *supra* note 38 at 89-90.

[82] Telephone Interview With Ilana Rosenzweig, *supra* note 35; Interview with Michael Gennaco, *supra* note 35.

[83] *See* Schwartz, *supra* note 13 at 1065-66.

[84] *See* Telephone Interview with Ilana Rosenzweig, *supra* note 35; Interview with Michael Gennaco, *supra* note 35; PORTLAND TORT CLAIMS REPORT, *supra* note 48; Telephone Interview with Richard Rosenthal, *supra* note 35; Telephone Interview with Kathryn Olson, *supra* note 35.

When a lawsuit is filed, department officials compare the allegations in the complaint with incidents reported through civilian complaints, use of force reports, and other reporting systems.[85] If the incident was not previously brought to the attention of department officials,[86] officials will decide what type of review should be conducted.[87] As with civilian complaints, internal affairs investigates the most serious allegations and department supervisors review the less serious claims.[88] If an internal investigation substantiates the allegations in the lawsuit, the departments discipline, retrain, or terminate the involved officers.

3. Early Intervention Systems

Two of the departments in this study – the LASD and the Seattle police department[89] – enter lawsuit claims information into their early intervention systems, which are computerized[90] systems that track various pieces of information in an effort to identify at-risk officers and improve their performance before officers engage in significant misconduct.[91] Once an officer accumulates a certain

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[85] There has been no study of the number of departments that internally investigate litigation claims, but police practices experts recently described this type of policy as rare. In most departments, legal claims are investigated and defended with no effort to incorporate findings into personnel and policy decisions. *See* Schwartz, *supra* note 13 at 1059.

[86] For a discussion of the likelihood that departments will be notified of misconduct allegations through lawsuits, *see* Part II.A.

[87] *See, e.g.*, Interview with Michael Gennaco, *supra* note 35 (noting that the Office of Independent Review will "ensure that when claims come in we get them, we review them, and if there are issues that suggest that an internal affairs investigation or an administrative investigation is needed, we will push to have that happen.")

[88] *See* SAMUEL WALKER, THE NEW WORLD OF POLICE ACCOUNTABILITY 62-63 (2005) [hereinafter POLICE ACCOUNTABILITY].

[89] National data suggests that early intervention systems are the most frequently used system to track and analyze data about officer performance. *See* Schwartz, *supra* note 13 at 1058-59. Of the five departments in my study, the Los Angeles Sheriff's Department and the Seattle Police Department track litigation data in their early intervention system. Portland and Denver have early intervention systems, though litigation data is not included. And the Chicago Police Department's system is still being developed. *See id.*

[90] Early intervention systems are not always computerized; some departments, particularly smaller departments, may engage in this analysis without computerized assistance. *See, e.g.*, International Association of Chiefs of Police, *Protecting Civil Rights: A Leadership Guide for State, Local, and Tribal Law Enforcement* 52 (2006) [hereinafter *Protecting Civil Rights*], available at: http://www.cops.usdoj.gov/files/ric/Publications/e06064100.pdf.

[91] For helpful descriptions of early intervention systems, *see* POLICE ACCOUNTABILITY, *supra* note 88; *Protecting Civil Rights*, *supra* note 90 at 49-77; Samuel Walker, EARLY INTERVENTION SYSTEMS FOR LAW ENFORCEMENT AGENCIES: A PLANNING

number of incidents, a supervisor decides whether some sort of intervention is necessary based on the totality of the circumstances.[92] Following intervention, the department monitors the officer's performance, paying particular attention to the types of incidents that initially triggered intervention.[93]

Early intervention systems can fail or stall at each stage of development and implementation. Departments can take years to design their early intervention systems, and then, once designed, software and hardware malfunctions can further delay systems' operability.[94] Even when an early intervention system is in place, officials may input inaccurate and incomplete information into the systems, misuse their systems when extracting information, and make biased decisions about the need for intervention and the type of intervention required.[95]

Although we do not know the incremental value of lawsuit data to early intervention systems, there is evidence that functioning early intervention systems can reduce misconduct.[96] A study of the Los Angeles Sheriff's Department found officers' shootings, uses of force, and civilian complaints declined after intervention.[97] After their two-year monitoring period ended, their performance improvements continued.[98] Anecdotal evidence from other departments supports the notion that early intervention systems help identify problem behaviors and

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AND MANAGEMENT GUIDE 27 (2003) available at http://www.cops.usdoj.gov/files/RIC/Publications/e07032003.pdf.

[92] Interventions generally involve counseling or retraining of selected officers. *See* THE NEW WORLD OF POLICE ACCOUNTABILITY, *supra* note 88 at 115. Counseling can range "from the very informal, such as a discussion of the indicating event with a supervisor, to the more formal, such as a referral to psychological counseling, stress management, or substance abuse programs through a department's employee assistance program." *See Protecting Civil Rights, supra* note 90 at 65. Interventions are not, however, generally disciplinary in nature. The goal is to intervene before discipline is necessary. For a description of the Los Angeles Sheriff's Department's Personnel Review Committee meetings and decisionmaking process, see LASD FIFTEENTH SEMI-ANNUAL REPORT, *supra* note 76 at 45-48.

[93] *Protecting Civil Rights*, *supra* note 90 at 65.

[94] *See* Schwartz, *supra* note 13 at 1061-62.

[95] *See* Schwartz, *supra* note 13 at 1062.

[96] Available evidence does not measure the effect of lawsuits on these performance improvements; some departments with successful early intervention systems do not track lawsuit data. *See* Samuel Walker, Geoffrey P. Alpert, and Dennis J. Kenney, *Early Warning Systems: Responding to the Problem Police Officer* (2001), available at http://www.ncjrs.gov/pdffiles1/nij/188565.pdf (finding officers were named in one-half or one-third as many civilian complaints after intervention, but none of the departments studied track legal claims in their early intervention systems). For the difficulty of measuring the effects of lawsuits on behavior, *see infra* II.D.

[97] *See* LASD FIFTEENTH SEMI-ANNUAL REPORT, *supra* note 76 at 3.

[98] *See id*.

improve officer performance.[99]

4. Reviews of Closed Case Files

Four of the departments in this study – Chicago, Seattle, Portland, and the Los Angeles Sheriff's Department – compare information in closed litigation files with information in closed internal affairs investigation files. Through this comparison, departments double-check the accuracy and completeness of their internal investigations. In Chicago, the investigator can reopen an internal investigation closed without a finding of wrongdoing if the litigation file identifies new witnesses or previously unavailable testimony or evidence.[100]

Kathryn Olson, the director of Seattle's OPA, uses closed litigation files to reveal inadequacies in their internal investigations. By comparing closed litigation files and internal investigation files, Olson has identified weaknesses in interviewing techniques and evidence-gathering efforts.[101] Olson looks particularly closely at cases where there was a large payout in the court case but an internal investigation exonerated the officer. In some cases, OPA will conclude that the officers' conduct was "lawful but awful": The officer harmed the plaintiff, justifying the litigation payout, but he did not violate department policy, justifying internal affairs' decision to exonerate the officer.[102] OPA may, instead, find an unwarranted disconnect between the results of the lawsuit and the internal investigation, suggesting that the exoneration was improper. Similarly, Portland reviews closed cases to see "whether the bureau or the independent review missed anything."[103]

The LASD reviews closed litigation files not only to audit internal investigations,[104] but also to evaluate department training and policies. The LASD's special counsel conducts "biopsies" of closed lawsuits "to assess how new

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[99] *See infra* note 189 and accompanying text (describing positive effects of early interventions in two large police departments).

[100] *See* Telephone Interview with Ilana Rosenzweig, *supra* note 35.

[101] *See* Telephone Interview with Kathryn Olson, *supra* note 35.

[102] *See* Telephone Interview with John Fowler, *supra* note 35.

[103] Bernstein, *supra* note 65.

[104] When the LASD auditor reviewed 29 cases of police misconduct that settled for over $100,000 and found that only eight involved any disciplinary action, the auditor questioned the strength of the department's internal investigatory procedures. MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, NINETEENTH SEMI-ANNUAL REPORT 30 (2005) [hereinafter LASD NINETEENTH SEMI-ANNUAL REPORT]. And the LASD auditor found it "ironic and somewhat puzzling that the County's lawyers and the Board of Supervisors can judge the risk of loss to be sufficiently great to believe it to be in the best interest of the County to settle for $500,000 and incur $200,000 in attorney's fees but the LASD, on the other hand, is paralyzed from taking any disciplinary action against the deputy because it cannot figure out who to believe, the deputy or" the plaintiff. LASD FIFTEENTH SEMI-ANNUAL REPORT, *supra* note 76 at 72.

training plays out on the street, or to determine whether new training is needed."[105] The L.A. County Board of Supervisors – responsible for paying settlements and judgments on behalf of the department – separately requires the LASD to submit a corrective action plan for each case ending in a settlement or judgment of more than $20,000. The plan must set out any policy or training issues raised by the case and steps the department will take to reduce the likelihood of future similar incidents.[106]

D. The Effect of Lawsuit Data on Behavior

It is difficult to measure the effects of litigation data on behavior in these departments. Departments are engaged in a variety of efforts aimed at reducing misconduct, only some of which involve lawsuits.[107] And when departments do use litigation data, they view that data in connection with multiple other pieces of information.[108] Moreover, departments cannot always weigh complete information, and cannot always evaluate the information in sound ways.[109] Although independent outsiders identify and help correct these implementation problems, they too have been criticized for insufficiently rigorous review.[110] And officials may have offered biased descriptions of the merits of their own review. For all of these reasons, it is difficult to pinpoint the role of lawsuits in department decisions.

It is also difficult to measure the effect of department decisions on line officer behavior. There is no national data about how much misconduct exists in individual police departments, and no agreed upon metric to compare the quality of departments.[111] Departments in this study continue to employ officers that

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[105] LASD THIRD SEMI-ANNUAL REPORT, *supra* note 40 at 12.

[106] For a description of one such corrective action report, *see* MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, ELEVENTH SEMI-ANNUAL REPORT 64 (Dec. 1999) [hereinafter LASD ELEVENTH SEMI-ANNUAL REPORT].

[107] Departments may attempt to reduce misconduct through any number of strategies, including mediating complaints, improving use of force policies and reporting requirements, improving civilian complaint policies, improving internal investigations, and reviewing of shootings and other incidents.

[108] *See supra* Part I.D for descriptions of this contextual analysis.

[109] *See* Schwartz, *supra* note 13 at Part II.D (describing common implementation problems).

[110] *See, e.g.*, P.J. Huffstutter, *This Police Watchdog is Walking a Tough Beat*, L.A. TIMES (Feb. 11, 2008) (describing criticism of Chicago's police auditor); Bernstein, *supra* note 65 (describing efforts to give Portland auditor subpoena and disciplinary authority).

[111] *See* Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 28-32 (2009) (describing the lack of comparative data about police misconduct).

engage in high-profile incidents of apparent police misconduct.[112] One could conclude, based on these continuing instances of misconduct, that department policies are having little effect. On the other hand, departments might be even more dysfunctional without policies to review lawsuits and other data and outsiders to oversee department practices.

One way to evaluate the impact of department policies would be to compare the costs of suits against the department before and after implementation of relevant policies. By this metric, the LASD's efforts appear to be having a positive effect. During the first five years of the LASD's special counsel's tenure, the county's litigation costs decreased by $30 million.[113] And there is no evidence that officers' crime fighting efforts were chilled during this period.[114] But an auditor might be having a positive effect even if litigation costs did not drop so precipitously. As Denver's auditor explained, even if his work led to higher payouts in the short run, "it would be part of an overall risk-management strategy that would reduce liability in the long run."[115] More study would be necessary to understand the effects of litigation review on lawsuit filings and costs.

Another way to evaluate the impact of department policies is to examine the role of lawsuits in individual decisions. This study has revealed several instances in which departments have used lawsuit data to inform personnel and policy decisions, and those decisions improved behavior in a variety of ways. The litigation process revealed evidence proving an officer to have lied during his

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[112] *See, e.g.*, Mike Carter, *Justice Department Begins Preliminary Review of Seattle Police*, SEATTLE TIMES (Jan. 24, 2011) (reporting that the Department of Justice is investigating a possible pattern of civil rights violations after "highly publicized incidents in which officers have resorted to force, often against people of color"); Chasse Report, *supra* note 20; Robert Faturechi & Andrew Blankstein, *L.A. County Sheriff's Department Fosters 'Gang-Like Activity' Among Jail Deputies, Suit Alleges,* L.A. TIMES (May 5, 2011); Sara Burnett, *Two Denver Officers Caught on Tape Beating a Man Are Fired,* THE DENVER POST (Mar. 26, 2011).

[113] *See* LASD SEVENTH SEMI-ANNUAL REPORT, *supra* note 63 at 51 (describing drop in litigation costs); Correspondence with Merrick Bobb (June 14, 2009) (reporting that the LASD auditor charges the County of Los Angeles $200,000 per year for his services). This $30 million reduction in legal fees is not solely attributable to the LASD's review of litigation data, but rather to the LASD's policies as a whole. For a description of the LASD's other strategies to reduce litigation costs, *see* LASD FIRST SEMI-ANNUAL REPORT, *supra* note 35 (noting LASD reduces litigation costs through "participation in the management of litigation to shape strategy and control costs, active involvement by the LASD in decisions to settle or try individual cases, and deployment of LASD investigatory resources so that the Department and counsel are better able to defend the LASD in litigation against it and win meritorious cases").

[114] *See* LASD NINTH SEMI-ANNUAL REPORT, *supra* note 76 at 83.

[115] Joel Warner, *Independent Monitor Richard Rosenthal Keeps a Close Eye on the Denver Police*, DENVER WESTWORD NEWS (May 17, 2011).

interview with internal affairs.[116] Trends in claims have caused department officials to realize that officers did not understand the scope of their legal authority, and resulting interventions have ended the problem.[117] Trends in payouts have also caused a department to identify a troubled station for further investigation and review; the subsequent recommendations improved the station's performance.[118] Although I cannot quantify the power of the information gathered from lawsuits on behavior, my close examination of these decisions allows me to be reasonably certain that lawsuit data has helped identify problems and craft interventions.[119]

II. CONSIDERING THE VALUE OF LAWSUIT DATA TO PERFORMANCE IMPROVEMENT EFFORTS

I have, thus far, shown that these five departments view lawsuits as sources of information about police department practices. I now offer reason to believe that these suits offer valuable and otherwise unavailable information to law enforcement agencies seeking to improve performance. Police departments primarily learn of possible misconduct through civilian complaints and use-of-force reports.[120] Yet, for a variety of reasons, misconduct incidents may not appear in these reports. And, even when incidents do surface, internal investigations may be incomplete or biased. Lawsuits are flawed sources of information, as well.[121] But in departments that pay attention to lawsuits, suits have filled some gaps in internal information systems. Lawsuits have alerted police officials to misconduct allegations unreported through internal systems, and the evidence developed during litigation has been found to be more detailed than that generated in internal investigations.

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[116] *See infra* notes 171-177 and accompanying text.

[117] *See supra* notes 66-69 and accompanying text.

[118] *See supra* notes 73-81 and accompanying text.

[119] A focus on decisionmaking practices can, in fact, better control for unrelated factors. Imagine a police department that experiences a precipitous jump in the number of lawsuits alleging chokeholds by its officers. If there is a subsequent decline in these chokehold cases, but the department does not keep track of lawsuits brought against it, those suits did not likely play a role in the decline. On the other hand, if there is no marked decline in the number of chokehold cases filed against the department but there is good evidence that the department gathered and evaluated lawsuit data, identified chokeholds as a potential problem, and trained officers in new techniques, then there is reason to believe that the suits may have influenced department decisionmaking, but those decisions were counteracted by other events.

[120] *See generally* POLICE ACCOUNTABILITY, *supra* note 88 (describing use of force and civilian complaint policies).

[121] In Part III, I describe the imperfections of litigation data and the ways departments consider lawsuits in light of these imperfections.

A. Identifying Misconduct Allegations

1. *Civilian Complaints v. Lawsuits*

Although almost every police department has a policy to accept and investigate civilian complaints against police personnel,[122] there are four reasons to believe that misconduct allegations fall through the cracks of police department civilian complaint processes. First, a very small percentage of aggrieved people file civilian complaints. A Bureau of Justice survey estimated that police used or threatened force against 664,500 people nationwide in 2002.[123] Of the people surveyed who had been involved in a police use of force, over 75% believed the force was excessive and approximately 87% believed officers had acted improperly, yet less than 13% filed a civilian complaint.[124] Accordingly, the civilian complaint process did not capture approximately 578,115 allegations of improper force and related misbehavior in a single year. Another approximately 3.7 million people believed that police acted improperly in contacts that did not involve the use of force.[125] Given low filing rates for civilian complaints alleging excessive

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[122] *See Protecting Civil Rights, supra* note 90 at 85 (2006) (reporting that "three in four municipal departments with four or fewer full-time officers had [a civilian complaint] policy," and "all state police agencies, all county police agencies, and all regional police agencies had civilian complaint policy directives").

[123] U.S. Department of Justice Bureau of Justice Statistics, *Contacts between Police and the Public: Findings from the 2002 National Survey* v (2005) [hereinafter *BJS 2002 Study*]. The BJS surveyed over 75,000 people about their contacts with the police, and estimated national numbers based on their survey results. The Bureau of Justice has conducted several similar surveys, and has reached findings with some variation in each. *See* U.S. Department of Justice Bureau of Justice Statistics, *Contacts Between Police and the Public, 2005* (2007) (finding that police used or threatened force against an estimated 707,520 people in 2005); U.S. Department of Justice Bureau of Justice Statistics, *Police Use of Force: Collection of National Data;* U.S. Department of Justice Bureau of Justice Statistics, *Contacts between Police and the Public: Findings from the 1999 National Survey* (2001) (finding that police used or threatened force against approximately 422,000 people).

[124] *BJS 2002 Study, supra* note 123. The other BJS studies found a similar percentage of those surveyed believed that the force used against them was improper. *See* U.S. Department of Justice Bureau of Justice Statistics, *Contacts Between Police and the Public, 2005* (2007) (finding that 83% of those who had force used against them believed the force was excessive) [hereinafter *BJS 2005 Study*]; U.S. Department of Justice Bureau of Justice Statistics, *Police Use of Force: Collection of National Data;* U.S. Department of Justice Bureau of Justice Statistics, *Contacts between Police and the Public: Findings from the 1999 National Survey* (2001) (finding that 76.1% of those who had force used against them believed the force was excessive). None of the other surveys estimate the percentage of people who filed civilian complaints regarding those incidents.

[125] The BJS's 2005 survey reported that 10% of the 43.5 million people who had contact with the police in 2005 believed the police had acted improperly. *See BJS 2005*

force, it seems likely that a significant percentage of these 3.7 million people did not file civilian complaints, either.

Lawsuits also under-represent the universe of misconduct allegations. The same 2002 Bureau of Justice survey found that people who believed the police mistreated them sued infrequently – approximately one percent of the time.[126] People harmed by the police may not sue for any number of reasons, including "ignorance of their rights, poverty, fear of police reprisals, or the burdens of incarceration."[127] But the same people who decide not to file civilian complaints may choose instead to file lawsuits. Plaintiffs' attorneys have been known to discourage their clients from filing civilian complaints for fear that information in the internal investigation will be used against them in litigation.[128]

Portland and the LASD have compared lawsuit and civilian complaint filings, and both found that many lawsuit claims had not previously been filed as civilian complaints. In 2004, Portland's police auditor found that between two-thirds and ninety percent of claims in lawsuits brought against the department and its officers were not separately brought as civilian complaints.[129] When the Kolts Commission reviewed 124 excessive force lawsuits that had resulted in judgments or settlements against the LASD, it found that plaintiffs in fewer than half of the

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Study, supra note 124. There is no comparable number in the BJS's 2002 study, but given the consistency in other aspects of the two stories, one can assume that the figures would be comparable had they been collected in 2002.

[126] *See BJS 2002 Study*, *supra* note 123 at 20 (finding that the police had used force against 664,500 people, 87.3% of whom (580,108) believed that the police acted improperly, and just 1.1% of whom (7,416) filed a lawsuit regarding the alleged misconduct.

[127] Daniel M. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General,* 88 COLUMBIA L. REV. 247, 284 (1988); *see also generally* Richard Abel, *The Real Tort Crisis: Too Few Claims*, 48 OHIO STATE L. J. 443, 448-51 (1987).

[128] *See* HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 306 (1998) ("Lawyers bringing civil lawsuits against police officers [in New York] told Human Rights Watch that they often do not recommend that their clients file a complaint with [Internal Affairs] because the information provided is often used against the client.") The police auditor in Chicago has found that plaintiffs' attorneys regularly prevent plaintiffs and witnesses from cooperating with investigators, "effectively shutting off the IPRA's access to information." *See* ILANA B.R. ROSENZWEIG, INDEP. POLICE REVIEW AUTH., ANNUAL REPORT 2007–08, at 8 (2008). *See also* Bernstein, *supra* note 65 ("If the lawyer doesn't respond [to the Portland police auditor's request for information], 'that pretty much stymies us, unless the police reports themselves raise serious issues of misconduct'").

[129] *See* PORTLAND TORT CLAIMS REPORT, *supra* note 48 (finding that two-thirds of people who filed lawsuits did not file separate civilian complaints). Moreover, claims in lawsuits against the department involved more serious allegations than those in civilian complaints: 50 percent of lawsuits alleged excessive force compared to just fifteen percent of civilian complaints filed during the same period. *See id.* at 21.

cases had filed civilian complaints.[130] Even as Portland and the LASD have improved their civilian complaint collection and review processes, both departments continue to learn about misconduct allegations through lawsuits.[131]

Second, civilian complaints capture misconduct allegations only when complainants describe their claims completely and clearly. People registering a civilian complaint generally do so orally (over the phone or in person at the station) or by filling out a form.[132] The informality of these methods of communication may dilute complainants' allegations. Lawyers, not always known for the clarity of their prose, may nevertheless better articulate all dimensions of the alleged violations. As the director of Seattle's OPA explained:

> someone comes in and says "this happened to me" – and it gets treated as a use of force [uof] complaint. But when a lawsuit is filed, a number of allegations may be raised that might be different from a simple uof. People will talk in terms of being a vic-

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[130] KOLTS COMMISSION REPORT, *supra* note 36 at 60 (noting that just 57 of the 124 lawsuits reviewed had been internally investigated). The Kolts Commission study of excessive force cases does not answer whether similar disparities exist for lawsuits alleging other types of claims.

[131] *See, e.g.*, Interview with Michael Gennaco, *supra* note 35 (estimating that the LASD learns of misconduct allegations through lawsuits "a significant number" though "not a majority" of the time). The Portland Auditor has continued to find that many lawsuits concern claims not previously submitted as civilian complaints. *See* LAVONNE GRIFFIN-VALADE & MARY-BETH BAPTISTA, OFFICE OF THE CITY AUDITOR, PORTLAND, OR., INDEPENDENT POLICE REVIEW DIVISION ANNUAL REPORT 2009, at 19 (2009) (finding that of 165 civil claims filed, only 29 had been previously submitted as civilian complaints); GARY BLACKNER & MARY-BETH BAPTISTA, OFFICE OF THE CITY AUDITOR, PORTLAND, OR., INDEPENDENT POLICE REVIEW DIVISION ANNUAL REPORT 2008, at 23 (2008) (finding that of 163 civil claims reviewed in 2008, only 30 had been previously submitted as civilian complaints); GARY BLACKNER & MARY-BETH BAPTISTA, OFFICE OF THE CITY AUDITOR, PORTLAND, OR., INDEPENDENT POLICE REVIEW DIVISION ANNUAL REPORT 2007, at 23 (2007) (finding that of 184 claims reviewed by the Portland auditor in 2007, only 42 had already been alleged in civilian complaints); GARY BLACKNER & LESLIE STEVENS, OFFICE OF THE CITY AUDITOR, PORTLAND, OR., INDEPENDENT POLICE REVIEW DIVISION ANNUAL REPORT 2005–2006, at 22 (2006) (finding that only 10 percent of civil claimants filed separate civilian complaints). Portland's auditor does not open internal investigations for many of these lawsuit claims. For example, in 2009, the auditor opened only seven internal investigations from the 136 lawsuits alleging new claims. *See* LAVONNE GRIFFIN-VALADE & MARY-BETH BAPTISTA, OFFICE OF THE CITY AUDITOR, PORTLAND, OR., INDEPENDENT POLICE REVIEW DIVISION ANNUAL REPORT 2009, at 19 (2009).

[132] U.S. DEPARTMENT OF JUSTICE, PRINCIPLES FOR PROMOTING POLICE INTEGRITY 7 (2001) (describing that police departments should allow civilians to "file complaints in-person, by mail, by telephone, by facsimile transmission, or, where possible, by email").

> tim of biased policing. But unless they are able to articulate it expressly – I'm African American, he's white – it's not going to come into the civilian complaint.[133]

Well-drafted legal complaints will include every involved party, every relevant fact, and each plausible cause of action. This level of detail can help police officials understand the full scope of the allegations. As the LASD's risk manager explained, "by the time it gets actually to be a government claim, it's at least pretty well defined into what areas it captures, and I think we're able to sort through those a little better."[134]

Third, departments may discourage people from filing complaints. The Department of Justice (DOJ) has investigated civilian complaint processes in over two-dozen law enforcement agencies, and found fault with each of the departments' systems for receiving complaints of officer misconduct.[135] The DOJ found some departments were not doing enough to solicit complaints; their forms were unclear or written only in English, or the department did not disseminate information about the complaint process.[136] In other departments, officers discouraged or hassled civilians attempting to file complaints, or refused to accept complaints altogether.[137]

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[133] Telephone Interview with Kathryn Olson, *supra* note 35.

[134] *See* Telephone Interview with Captain Mathers, *supra* note 35.

[135] For the precise provisions in the settlement agreements and consent judgments entered into between the Department of Justice and law enforcement agencies, and for the technical assistance letters provided to over a dozen additional law enforcement agencies, *see* www.usdoj.gov.

[136] *See, e.g.*, Technical Assistance Letter to the Inglewood Police Department at 18-19 (recommending that "[t]he IPD should change elements of its citizen complaint process that have the potential to discourage the filing of complaints, and to impair effective tracking of complaints"); Technical Assistance Letter to Yonkers Police Department at 18-19 (recommending that the Yonkers police department "increase public awareness of how to use the citizen complaint process" and increase access to civilian complaint forms by distributing them at public facilities and printing forms in Spanish); Technical Assistance to the Austin Police Department at 28 (recommending that the department "better disseminate information to the public about its complaint process" by making complaint forms available online and in public offices, and in multiple languages); Technical Assistance Letter to Virgin Islands Police Department at 15 (finding that the department's civilian complaint forms "are inadequate and inconsistent with generally accepted police practices"); Technical Assistance Letter to the Beacon Police Department at 15 (finding that the department has no "formalized system for the intake and tracking of complaints," and only allows a civilian to file a complaint if he has first discussed the matter with the Sergeant); Technical Assistance Letter to the Schenectady Police Department at 16-17 (recommending that it be made easier for citizens to file complaints).

[137] *See* Technical Assistance Letter to the Austin Police Department at 28 (reporting that "communications personnel, i.e., 911 operators, on many occasions may have

The Christopher Commission, convened to investigate the Los Angeles Police Department (LAPD) in 1991, found that one-third of people who filed civilian complaints were harassed or intimidated in the process.[138] Twelve years later – after the LAPD had again been reviewed by an independent commission, had been investigated by the Department of Justice for civil rights violations, had entered into a Memorandum of Agreement with the DOJ, and had been placed under the supervision of a court-appointed monitor – the monitor found that department officials continued to harass and intimidate people who tried to file civilian complaints.[139]

Fourth, officials may mislabel or misfile civilian complaints so they are not investigated. Police departments generally have two levels of review; higher-

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discouraged complainants from filing complaints, failed to contact supervisors regarding complaints, and failed to document the calls and the complaints"); Technical Assistance Letter to the Warren Police Department at 10 (reporting that some citizens "have not been permitted to submit a Complaint Form to anyone other than" one single Lieutenant appointed to handle internal investigations, and only during "limited working hours"); Technical Assistance Letter to Portland Police Department at 10 (recommending that the department "change aspects of its complaint process that have the potential to discourage the filing of complaints"); Technical Assistance Letter to the Schenectady Police Department at 16 (observing that the internal affairs division "receives approximately 5 to 10 complaints each year from citizens reporting that a SPD supervisor refused to accept their complaints"); Technical Assistance Letter to the Miami Police Department at 17 (identifying several policies and practices "that appear to discourage the filing of complaints"); Technical Assistance Letter to the Columbus Police Department (finding "a complaint process that discourages complainants at intake").

[138] *See, e.g.*, INDEP. COMM'N ON THE L.A. POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 158 (1991) [hereinafter CHRISTOPHER COMMISSION REPORT] (finding that one-third of the people who filed complaints against the LAPD reported that officers discouraged complaint filing by not providing Spanish-speaking officers in heavily Latino divisions, requiring complainants to wait for a long time before filing the complaint, and threatening the complainant with defamation suits or immigration consequences).

[139] "In one sting operation, an undercover police officer, posing as a juvenile, complained of misconduct. The Sergeant then took an inordinate amount of time to take the details of the complaint, stretching the process beyond 10:00 p.m., at which point the sergeant **detained** the ostensible juvenile for curfew violation." REPORT OF THE INDEPENDENT MONITOR FOR THE LOS ANGELES POLICE DEPARTMENT FOR THE QUARTER ENDING JUNE 30, 2003, at 3 (2003), available at: http://www.kroll.com/library/lapd/lapd_report_081503.pdf (emphasis in original). At that time, officers were found to follow department procedures only 43% of the time. *See id.* In a later audit, the monitor found that officers were complying with procedures 78% of the time. *See* REPORT OF THE INDEPENDENT MONITOR FOR THE LOS ANGELES POLICE DEPARTMENT FOR THE QUARTER ENDING DECEMBER 31, 2003, at 26 (2003), available at http://www.kroll.com/library/lapd/LAPD_Q10_Report.pdf. A subsequent audit found 84% compliance. *See* REPORT OF THE INDEPENDENT MONITOR FOR THE LOS ANGELES POLICE DEPARTMENT FOR THE QUARTER ENDING DECEMBER 30, 2004, at 19 (2004).

ranked officers within the precinct review less serious allegations and the internal affairs division investigates more serious allegations.[140] The Christopher Commission that investigated the Los Angeles Police Department found that "complaints of officer misconduct made by the public were often noted in daily activity logs rather than recorded in the official Personnel Complaint Form 1.81 that triggers a formal complaint investigation and IAD review."[141] Department of Justice investigations have revealed the same tactics used in other departments: officers improperly classify misconduct claims so that they will not be investigated by internal affairs.[142]

A plaintiff filing a lawsuit against the police does not face the same hurdles as a person trying to file a civilian complaint. Lawsuits against the police have their own challenges. Plaintiffs' attorneys in civil rights cases are generally paid on contingency, out of the proceeds won by the plaintiff.[143] As a result, a plaintiff may have trouble finding an attorney to take her case if the recoverable damages are low or there is a small likelihood of prevailing.[144] Once a case is filed, it may be dismissed for failure to state a plausible claim in the complaint or

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[140] *See* POLICE ACCOUNTABILITY, *supra* note 88 at 62-63 (describing administrative and internal affairs investigations).

[141] CHRISTOPHER COMMISSION REPORT, *supra* note 138 at 159.

[142] *See* Technical Assistance Letter to Inglewood Police Department at 20 (finding that some excessive force complaints were routed to division level reviews – instead of internal investigations – and were routed to "supervisors who were on the scene and completed the original use of force report . . .present[ing] an apparent conflict of interest"); Technical Assistance Letter to Austin Police Department (finding that the department's "process of complaint classification raises concerns because the classification categories are broad, subject to different interpretations, lack uniformity, and lack consistency," amounting to "'escape valves' that can minimize officers' misconduct"); Technical Assistance Letter to the Columbus Police Department (finding that the complaint process "transforms about half of the complaints that were filed into 'inquiries' that are not properly investigated"). *See also* SAN JOSE INDEPENDENT POLICE AUDITOR, YEAR END REPORT, 1993-1994 (1995).

[143] *See* Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. 1983 is Ineffective in Deterring Police Brutality*, 44 HASTINGS L. J. 753, 757 (1993) (noting that "few plaintiffs can afford counsel and most suits are taken on a contingency basis"); David Rudovsky, *Police Abuse: Can the Violence Be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 467 (1992) (describing the difficulty of hiring a lawyer on contingency to litigate a case against the police). *See also* note 179, discussing the frequency with which attorneys' fees are awarded under Section 1988.

[144] *See* Patton, *supra* note 143 at 757-58 (noting that, because most attorneys take police misconduct cases on contingency, "an attorney takes an enormous financial risk when filing a Section 1983 suit" and "will therefore be hesitant to accept a weak case or a case without significant damages").

on qualified immunity grounds.[145] But there is very little chance that a court clerk will harass or discourage a person attempting to file a lawsuit. And a lawsuit alleging police misconduct will not be mislabeled as a securities matter or improperly sent to probate.

2. Use of Force Reports v. Lawsuits

Incidents of possible misconduct can also come to a department's attention through officers' use-of-force reports.[146] Yet there are three reasons to believe that these reports will not capture all instances of alleged police misconduct. First, despite their name, use-of-force reporting policies do not require officers to document many types of uses of force. A national survey of use-of-force reporting requirements found that almost twenty percent of the departments did not require officers to submit a report after striking a civilian with a flashlight, approximately forty percent of the departments did not require an officer to submit a report after their police dog attacked a civilian, and over seventy percent of the departments did not require an officer to submit a report after using handcuffs.[147] In its investigations of law enforcement agencies, the Department of Justice similarly found that departments had ambiguous reporting requirements or required officers only to document the most serious uses of force.[148]

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[145] *See* Marc L. Miller, Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFFALO L. REV. 757 (2004) (describing difficulties of prevailing in lawsuits against the police).

[146] *Protecting Civil Rights*, *supra* note 90 at 136.

[147] *See* Anthony M. Pate & Lorie A. Fridell, *Toward the Uniform Reporting of Police Use of Force: Results of a National Survey*, 20 CRIM. JUST. REV. 123 (1995).

[148] *See, e.g.*, Detroit Consent Judgment (finding that Detroit police officers "are not required to report uses of force other than uses of firearms and chemical spray, unless the use of force results in visible injury or complaint or injury"); Inglewood Technical Assistance Letter at 16-17 (finding that the Inglewood Police Department "current practices of documenting uses of force within arrest or incident reports and policy have been under-inclusive in what the IPD has considered force, and, in turn, it appears that the reporting of force by officers has been underinclusive"); Yonkers Technical Assistance Letter at 17-18 (finding that use of force forms were required when an officer uses a firearm, but not when she uses a baton or deploys a K-9 unit, and recommending that a form be filled out whenever force is used); Technical Assistance Letter to the Austin Police Department at 18-22 (describing inadequacies with department use of force reporting protocols); Technical Assistance Letter to the Easton Police Department at 6 (finding that the department does not have a form dedicated to use of force reporting, "making it extremely difficult to extract information to adequately track and analyze uses of force"); Technical Assistance Letter to the Warren Police Department at 6 (finding that the department requires officers to fill out a use of force form "any time their actions alleged result in injury or death, any time they utilize a non-lethal weapon, and any time they discharge their firearm" and recommending, instead, that the department require a form be completed "for all uses of force beyond unresisted handcuffing"); Technical

Second, use-of-force reporting systems do not capture claims related to verbal abuse, sexual harassment, improper searches, and other incidents that do not involve force. In the Los Angeles Sheriff's Department, which has rigorous internal use-of-force reporting systems, the auditor noted that several types of allegations tend to be identified only through legal claims, including "Fourth Amendment allegations, allegations of inappropriate entry, bad warrant or things that happen in the warrant, allegations that money was taken . . . discourtesy, [and] cases in which there may be constitutional violations or violations of policy but they don't result in injury."[149] If a lawsuit does not involve a use of force, department officials likely will not learn about the incident through internal reporting channels. Fittingly, many of the trends identified through lawsuits by the departments in this study concern incidents that would not prompt use of force reports: falls from upper bunks; vehicle pursuits; improper searches of inmates; responses to the wrong address; and warrantless home entries.[150]

Third, officers do not always follow use-of-force reporting policies. An investigation of use of force reports in Philadelphia found that descriptions of incidents "were routinely sparse, vague, inaccurate, or incomprehensible."[151] Descriptions of injuries similarly lacked detail: "A 'head injury' could refer to a scratch, sutures, a concussion, or a broken skull."[152] The Kolts Commission, which examined the Los Angeles Sheriff's Department, found that uses of force described in deputies' arrest reports "almost always [were] at wide variance with the allegations made by the plaintiff in a lawsuit" such that "a deputy's report

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Assistance Letter to Virgin Islands Police Department at 11 (noting that a use of force report is required "only when there is an injury, medical treatment is required or requested, or the force used related to a criminal charge (i.e., resisting arrest, assault, endangering or harassment)"); Technical Assistance Letter to the Beacon Police Department (finding that the department's policies "do not clearly indicate the manner in which uses of force are to be reported"); Technical Assistance Letter to the Bakersfield Police Department at 5 (finding the department's requirement that a use of force form be filled out "when an officer uses a level of force higher than 'standard searching and handcuffing techniques'" to be overly ambiguous); Technical Assistance Letter to Portland Police Department at 5-6 (finding that "officers are not required to report 'restraining force' or certain other types of physical contacts with citizens," and that use of force forms are unclear); Technical Assistance Letter to the Schenectady Police Department at 9 (finding, despite a "very broad reporting requirement, command level and line officers acknowledge that officers rarely document uses of force and that supervisors do not enforce the reporting policy"); Technical Assistance Letter to the Miami Police Department (finding that the department's use of force reporting requirements "are likely to lead to an under-reporting of the use of force"); Technical Assistance Letter to the Columbus Police Department (finding an "overly restrictive definition of what constitutes a use of force").

[149] *See* Interview with Michael Gennaco, *supra* note 35.

[150] *See supra notes* 66-69 and accompanying text.

[151] INTEGRITY AND ACCOUNTABILITY OFFICE, PHILADELPHIA POLICE DEPARTMENT, THIRD REPORT 28 (July 1999).

[152] *Id.*

alone could not have alerted a supervisor to a problem."[153] Even after several years of oversight, the auditor for the LASD continued to find widespread underreporting.[154] A well-crafted complaint is unlikely to suffer from similar vagueness or lack of detail.

B. Details of the Incidents

Even when a police department already knows about a misconduct allegation, lawsuits can reveal critical details about the event. Police department internal affairs divisions investigate serious uses of force and allegations of misconduct. Yet internal affairs investigations have long been found to be inadequate and incomplete.[155] In their study of fourteen police departments, Human Rights Watch found that,

> [i]n each city we examined, internal affairs units conducted substandard investigations, sustained few allegations of excessive force, and failed to identify, or deal appropriately with, problem officers against whom repeated complaints had been filed. In many cases, sloppy procedures and an apparent bias in favor of fellow officers combine to guarantee that even the most brutal police avoid punishment for serious violations until committing an abuse that is so flagrant, so unavoidably embarrassing, that it cannot be ignored.[156]

Indeed, no outside reviewer has "found the operations of internal affairs divisions in any of the major U.S. cities satisfactory."[157]

The Department of Justice found fault with internal investigation procedures in each of the over two-dozen departments it investigated. The DOJ found that many departments had no standard procedures for documenting or investigating complaints.[158] When departments did investigate misconduct allegations,

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[153] KOLTS COMMISSION REPORT, *supra* note 36 at 56.

[154] LASD THIRD SEMI-ANNUAL REPORT, *supra* note 40 at 42-43. For problems with the reports, *see id.* at 42-49.

[155] For an overview of the problems with civilian complaint processes, *see* POLICE ACCOUNTABILITY, *supra* note 88 at 71-99.

[156] Human Rights Watch, *supra* note 128 at 63.

[157] *Id.*

[158] For descriptions of the inadequacies of the civilian complaint investigation procedures in the departments that have been investigated but not sued by the DOJ *see, e.g.*, Technical Assistance Letter to the Inglewood Police Department at 22-23 (describing the "lack of a formal, structured, and consistent investigative process" in the department); Technical Assistance Letter to the Yonkers Police Department at 22-23 (recommending that the department "develop and implement a centralized, formal, structured, and

many did not follow the types of standard investigative procedures they would use to solve crimes: Investigators did not look for witnesses, collect evidence, interview police personnel, or reconcile inconsistent statements.[159]

A study of the Chicago Police Department's internal affairs division found that the investigations were consistently shoddy and incomplete, "violat[ing] virtually every canon of professional investigation."[160] The officer accused of misconduct was interviewed in less than 15% of the cases. When the officer was interviewed, often months after the incident, the "questioning" was in the form of a brief questionnaire that the officer had seven to ten days to complete in writing. It was "not uncommon" to find a complaint unsubstantiated even though several officers submitted virtually verbatim questionnaire responses.[161] Investigators rarely interviewed civilians and witnesses in person. And while the investigators ran background checks on the complainants and witnesses who

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consistent system for resolving complaints without discouraging the filing of complaints"); Technical Assistance Letter to the Austin Police Department (finding evidence that the department's internal investigatory process is "erratic and irregular" and that "IA did not always investigate their complaints"); Technical Assistance Letter to the Easton Police Department at 9-10 (finding that the department did not keep civilian complaints and investigations organized in a single file or office, making personnel and trend review impossible, and that the department "has no formal policies governing investigative training, evidence collection and storage, victim and witness interviews, or case file documentation and retention"); Technical Assistance Letter to the Bakersfield Police Department at 14 (finding that internal investigations are inconsistent and incomplete).

[159] REPORT OF THE INDEPENDENT MONITOR FOR THE LOS ANGELES POLICE DEPARTMENT FOR THE QUARTER ENDING SEPTEMBER 30, 2003 at 25 (2003), available at http://www.kroll.com/library/lapd/LAPD.Q9.%20Final%20Report.11-17-03.pdf (finding that the internal affairs division for the LAPD failed to tape review witness interviews, did not canvas the area for witnesses, allowed group interviews, failed to collect or preserve evidence, and failed to identify inconsistent statements); Technical Assistance Letter to Warren Police Department at 17-18 (expressing concern that department policy does not "require basic investigative techniques, including questioning WPD personnel through personal interviews or gathering extrinsic evidence – e.g., third party witness accounts, or photographs of alleged injuries"); Technical Assistance Letter to the Cleveland Division of Police at 9 (finding that internal investigators "inject opinions and speculation that may call into question the objectivity of the investigation" and raising concerns about the thoroughness of internal investigations); Technical Assistance Letter to Portland Police Department (finding investigators to be inadequately trained); Technical Assistance Letter to the Schenectady Police Department at 20-21 (recommending that investigators be trained in standard investigative policies and practices); Technical Assistance Letter to the Columbus Police Department (finding "a process for investigating complaints, uses of force (lethal and non-lethal), and injuries to prisoners that is biased in favor of the involved officers").

[160] Craig B. Futterman, H. Melissa Mather & Melanie Miles, *The Use of Statistical Evidence to Address Police Supervisory and Disciplinary Practices: The Chicago Police Department's Broken System*, 1 DEPAUL J. SOC. J. 251, 274 (2008).

[161] *Id.* at 275.

corroborated allegations of misconduct, the investigators did not review complaint histories of the police officers involved.

Approximately twenty percent of large police departments have some form of civilian review, and a quarter of these departments' civilian review boards have independent investigatory authority.[162] There has been little examination of the quality of these investigations. Because the investigators are independent, there should be less bias and capture. These boards can, however, suffer from a lack of funding, leadership, and political will.[163]

Attorneys engaged in police misconduct litigation will rarely be accused of foot-dragging when investigating their cases. Whether motivated by their ethical obligations or the promise of a percentage of any recovery, plaintiffs' civil rights attorneys have strong incentives to uncover all evidence that might support their client's claims. They will depose the involved officers under oath, seek out additional witnesses, and request documents about the incident and the officers. Attorneys representing the defendants will protect their client's interests by digging for evidence that rebuts plaintiffs' claims and supports their clients.

Those who have examined evidence developed during litigation and internal investigations have found litigation files to be far more comprehensive. The director of Seattle's OPA has found that litigation produces valuable information: "Just by function of depositions and someone else taking a new look at it, chances of getting new information [through the litigation process] are likely."[164] Special Counsel for the Los Angeles Sheriff's Department regularly compares closed litigation files with closed internal investigation files and finds that litigation files offer "the fullest record" of claims of police misconduct.[165] When misconduct allegations are investigated internally, he has found, "inertia weighs heavily on the side of disposing of a matter quickly and moving on; otherwise, time and resources and effort will have to be expended."[166] Even after a lawsuit is filed, those representing government defendants have little reason to identify or explore evidence of policy and personnel failures, particularly given that such evidence

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[162] There are several forms of civilian review, including police auditors, independent commissions, and civilian review boards. A 2003 study found that some form of civilian review is in place in approximately nineteen percent of municipal law enforcement agencies with more than 100 sworn officers, 25 percent of county police departments, six percent of sheriffs' departments, and none of the 49 state agencies surveyed. *See Protecting Civil Rights*, *supra* note 90 at 94. One in four of the civilian review boards had independent investigatory authority. *See id.*

[163] *See* POLICE ACCOUNTABILITY, *supra* note 88 at 165-67 (discussing failed police auditors); Stephen Clarke, *Arrested Oversight: A Comparative Analysis and Case Study*, 43 COLUMBIA J. OF LAW AND SOCIAL PROBLEMS 1 (2009) (studying different models of civilian oversight, and finding underfunding).

[164] *See* Telephone Interview with Kathryn Olson, *supra* note 35.

[165] LASD FIFTEENTH SEMI-ANNUAL REPORT, *supra* note 76 at 85.

[166] *Id.*

would likely be discoverable.[167] In contrast, plaintiffs have a "strong incentive . . . to dig deeply and generate more detailed and critical information" supporting their cases.[168] "If information exists, litigation is the likeliest vehicle to ferret it out."[169]

Richard Rosenthal — the police auditor in Denver and former auditor in Portland — has compared files of unsubstantiated internal investigations with closed litigation files for the same case and found that the outcome of the internal investigations might well have been different had investigators accessed the information uncovered during litigation.[170] In one notable Portland case, a man named James Chasse died of blunt force chest trauma after two transit division officers forced him to the ground.[171] His family brought suit against the involved officers.[172] An outside expert reviewed the internal investigation of the incident and found that internal affairs' investigation had neglected several critical leads. Internal affairs did not interview all of the officers who had reported to the scene, did not interview nurses who had observed Chasse at the jail, and did little to investigate allegations that officers had been "laughing and joking at the scene."[173]

The most "glaring deficiency" of the internal investigation was the failure to enhance a video taken the night of Chasse's death in which the involved officer and deputy were describing and reenacting their confrontation with Chasse.[174] Although the audio portion of the recording was "mostly unintelligible," Portland's internal affairs investigators did nothing to improve the sound.[175] Only during litigation did plaintiff's counsel improve the audio, at which point it became clear that the officer said he "tackled" Chasse, contradicting his statement to internal affairs that he had pushed Chasse to the ground.[176] As an expert's report concluded, "plaintiffs' attorney was the driving force behind [the Portland Police Bureau's] ultimate recognition of the importance of the video as evi-

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[167] As Merrick Bobb, the Los Angeles Sheriff's Department's special counsel, has observed, "[i]t is difficult to play that dual role of defending to the hilt the plaintiff's claims in a lawsuit, including the need to cast ambiguous facts in a favorable light and, at the same time, report the same facts internally in a cold and objective [sic] way for purposes of discipline." *Id.* at 78.

[168] *Id.* at 85.

[169] *Id.*

[170] *See* Telephone Interview with Richard Rosenthal, *supra* note 35.

[171] The facts of Chasse's arrest are hotly disputed. For the purposes of this description, I rely upon the findings of an outside auditor that studied the events of that evening. *See Chasse Report*, *supra* note 20 at 8 (The officers thought Chasse was "either urinating or possibly injecting drugs into his hand").

[172] *See id.*; *see also* Chasse v. Humprhries, available at: *http://images.bimedia.net/documents/070208_chasse_lawsuit.pdf*.

[173] *Chasse Report, supra* note 20 at 25.

[174] *Id.* at 27.

[175] *Id.* at 27.

[176] *Id.* at 27.

dence."[177]

Given what we know about law enforcement agencies' civilian complaint and use-of-force reporting protocols and internal investigations, it should be no surprise that information about police misconduct falls through the cracks. Although lawsuit data also has its flaws, suits have revealed valuable information about the incidence and details of police misconduct allegations. The gaps in civilian complaints, use-of-force reports, and internal investigations appear to be filled, at least in part, by information revealed in litigation.

III. MITIGATING THE WEAKNESSES OF LAWSUITS

I have, thus far, described the practices of a group of police departments that pay close attention to lawsuit data and shown that suits offer information unavailable through other sources. I do not, however, intend to idealize the information generated by damages actions. Many people never sue and lawsuit payouts can distort the extent of a defendant's responsibility. Lawsuits are resolved long after the underlying incident occurred and are generally focused on individual bad actors instead of the policy makers that could affect organizational change. And litigation can inhibit the type of information exchange necessary to understand and correct problem behavior.

Some departments have used these imperfections in litigation data to justify their decision to ignore lawsuits.[178] Yet these information flaws are not fatal.

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[177] *Id.* at 27-28.

[178] Mayor Bloomberg recently opposed the New York city council's efforts to gather information about pending lawsuits and settlements against the New York Police Department because, his spokesman testified, "the mere fact of a settlement in any litigation is not an acknowledgement of wrongdoing, or of the truth of the facts alleged. . . While some settlements seem unfair or even outrageous to us, and to the public, the Law Department's decision to settle a matter is largely separate from the merits of the litigation." Statement of William Heinzen, Deputy Counselor to the Mayor, New York City Council Committee on Governmental Operations (Dec. 11, 2009), on file with author. Police department officials in other jurisdictions have similarly argued that settlements are often strategic decisions – not admissions of wrongdoing – and so should not be probative of misconduct. *See, e.g.*, Lee Baca, Nicholas Riccardi, *Lawsuits Question Actions of Sheriff's Deputies in 3 Cases*, L.A. Times, Jan. 23, 2002 at B1; Rachel Gordon, *The Use of Force San Francisco: Tracking Makes Police Accountable, Panel Told*, S.F. CHRON., Feb. 5, 2006 at A10 (citing the San Francisco Police Department's risk manager as stating that legal settlements can be granted by City Attorney for various reasons and are not proof of officer misconduct); Robert Becker and Todd Lightly, *Deputies' abuse cases cost county*, CHICAGO TRIBUNE, Feb. 10, 2002 at C1 (same); HUMAN RIGHTS WATCH, *supra* note 128 at 81 (noting that internal affairs staff interviewed by Human Rights Watch in fourteen police departments "made statements such as 'civil cases are not our problem,' or asserted

Departments in this study compensate for the imperfections in lawsuits – and the imperfections in civilian complaints and use-of-force reports – by reviewing data from each source in context with other available information and using independent auditors to consider what the data may show.

A. The Inaccuracies of Claims and Evidence

The adversarial nature of litigation may produce biased and skewed information. Most people who believe their rights have been violated never sue.[179] And those cases plaintiffs' attorneys choose to take are not necessarily the strongest on the merits. Lawyers retained on contingency receive a portion of plaintiff's award and, therefore, will be attracted to high damages cases – even

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that the settled suits do not indicate the 'guilt' of an officer, disregarding the important information that citizen-initiated lawsuits could provide").

Police officials also contend that delays in the filing and adjudication of lawsuits make lawsuits arguably inferior to internal information sources. *See* Telephone Interview with Richard Rosenthal, *supra* note 35 (referring to lawsuits as "late warning systems"); Statement of William Heinzen, Deputy Counselor to the Mayor, New York City Council Committee on Governmental Operations (Dec. 11, 2009), on file with author (opposing legislation to gather lawsuit data because more timely information about alleged misconduct is available through the civilian complaints filed with the city's Civilian Complaint Review Board.)

[179] There are low filing rates for police misconduct claims, *see infra* note 126 and accompanying text (noting that 1% of people sue who believe they have been mistreated by the police). For studies of filing rates of medical malpractice claims, *see, e.g.*, Leon S. Pocincki et al., THE INCIDENCE OF IATROGENIC INJURIES 101 (1973) (finding that 6% of negligently injured people filed lawsuits); Patricia M. Danzon, MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY 23-24 (1985) (finding that about 10% of victims of medical malpractice filed claims); Troyen A. Brennan et al., *Incidence of Adverse Events and Negligence in Hospitalized Patients: Result of the Harvard Medical Practice Study I*, 324 NEW ENG. J. MED. 370, 370 (1991) (finding approximately 2% of those negligently injured ultimately sued); David M. Studdert et al., *Negligent Care and Malpractice Claiming Behavior in Utah and Colorado*, 38 MED. CARE 250 (2000); (finding 2.5% of those injured brought claims); Eric J. Thomas et al., *Incidence and Types of Adverse Events and Negligent Care in Utah and Colorado*, 38 MED. CARE 261-71 (2000) (same). For other studies of civil litigation filing rates, *see, e.g.*, Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 544 (1980-81) (finding that five percent of grievances became filed lawsuits); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996) (describing common disputes pyramids for tort claims, discrimination claims, and claims post-divorce); Deborah R. Hensler et al., RAND Inst. for Civil Justice, *Compensation for Accidental Injuries in the United States: Executive Summary* 19 (1991) (finding that lawsuits were filed for 44 percent of vehicle injuries, 7 percent of work injuries, and 3 percent of other injuries).

when there is middling evidence of liability.[180] Lawyers may also decline to take a case with strong evidence of liability but low recoverable damages; the plaintiff may be unemployed, incarcerated, or unsympathetic, or the claims may be too difficult to prove.[181]

Once a plaintiff retains a lawyer or decides to proceed *pro se,* she will present her very strongest case in her complaint.[182] A savvy defense attorney will deny her contentions to the hilt. During discovery, both sides will use interrogatories, requests for admission, document requests, and depositions to generate a great deal of information. The nature of discovery practice means that at least some of the information generated will be irrelevant, prejudicial, and inadmissible.[183] Not every discovery request or deposition question, even when asked in

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[180] Plaintiff's attorneys in civil rights cases will also be entitled to attorneys' fees if they prevail. *See* Section 1988. Many cases are resolved through settlement agreements, however, which do not necessarily include a provision for attorneys' fees. *See Evans v. Jeff D.* 475 U.S. 717 (1986). In those cases, the attorney will take a portion of the plaintiff's recovery.

[181] *See* Rudovsky, *supra* note 143 at 467 ("Because police abuse is most often directed against those without political power or social status, their claims are often dismissed or ignored); Meltzer, *supra* note 127 (observing that people mistreated by the police often do not bring claims because of "ignorance of their rights, poverty, fear of police reprisals, and burdens of incarceration"); Miller, *supra* note 2 at 68 (noting that, given heightened pleading standards in *Twombly* and *Iqbal*, meritorious but hard to prove cases may not be brought "because prospective litigants or their counsel may not have – or be willing to risk – the resources needed to investigate sufficiently prior to institution to survive a motion to dismiss").

[182] This is not to suggest that plaintiffs regularly lie in their complaints. Although some complaints will overstate the plaintiffs' case, there are strong incentives for a plaintiff to be judicious but thorough in her complaint. An attorney will not recover attorneys' fees for time spent on frivolous claims. In fact, a defendant can recover fees for time spent defending against frivolous claims. *See Christiansburg Garment Co. v.* EEOC, 434 U.S. 412 (1978); *Harris v. Maricopa County Superior Court*, 631 F.3d 963, 971-72 (2011). The threat of Rule 11 sanctions also discourages a plaintiff and her attorney from including unsupportable facts and claims. On the other hand, the plausibility pleading requirements in *Twombly* and *Iqbal* require plaintiffs to file detailed pleadings. *See supra* note 2.

[183] Although some evidence generated during discovery will be prejudicial and irrelevant, the general consensus among attorneys is that discovery produces the correct amount of information needed properly to litigate the case. Thomas E. Willging, Donna Stienstra, John Shapard, Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 531 (1998). Contingency-fee plaintiff's attorneys are particularly unlikely to engage in frivolous discovery practice: "To avoid expenditures that may never be reimbursed and to prevent the loss of potentially more attractive professional opportunities," contingent-fee lawyers are unlikely to "conduct unnecessary depositions or be inundated with documents or e-discovery to hunt for the proverbial 'smoking gun.'" Miller, *supra* note 2 at 67.

good faith, will uncover valuable evidence. And each witness may tell a version of the facts influenced by faulty memory or a preference for one side.[184]

The information generated by litigation will be further distorted if the parties do not have comparably resourced and capable counsel. Scholars have recognized that unequally matched counsel make it more difficult for neutral fact-finders to reach a just verdict.[185] Unequal litigators also affect the quality of the information generated by litigation. The lion's share of evidence may support plaintiff's claim not because the claim is meritorious, but because defense counsel overlooked critical areas of inquiry in his document requests and deposition questions.

Departments that pay attention to litigation data do not assume the data to be accurate or complete. Instead, they view the data skeptically, supporting or rebutting allegations with other available information. When departments investigate lawsuit claims, their investigations are parallel to and independent of the litigation discovery process.[186] Only after the internal investigation is complete do investigators review the litigation file to determine whether any additional information was uncovered in discovery. In this way, departments

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[184] *See, e.g.*, JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 86 (1949) ("[The witness] often detects what the lawyer hopes to prove at the trial. If the witness desires to have the lawyer's client win the case, he will often, unconsciously, mold his story accordingly. Telling and re-telling it to the lawyer, he will honestly believe that his story, as he narrates it in court, is true, although it importantly deviates from what he originally believed"); Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 304 (1988-89) (observing that "[w]itnesses may differ in what they think they saw; or there may be no witnesses on a significant issue so that the past must be reconstructed from circumstantial evidence; or, in some cases, witnesses may deliberately lie").

[185] *See* William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1873-74 (2002) ("If one side in adversarial adjudication is ill-equipped – it cannot afford access to the system, or has less time and money to pursue evidence, or less skill in developing legal claims – then what emerges as the stronger case might not necessarily be the better case"); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 843 (1985) ("It is a rare litigator in the United States who has not witnessed the spectacle of a bumbling adversary whose poor discovery work or inability to present evidence at trial caused his client to lose a case that should have been won"); Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 91 (2008) ("Because the adversarial system relies upon the parties to produce the facts, examine and cross-examine the witnesses, and present legal arguments on their own behalf, the parties must be at least somewhat equally capable of making their cases . . . If, due to a lack of resources, one party is unable to uncover evidence or is less skilled in developing legal arguments, the outcome might be skewed in favor of her better-equipped adversary").

[186] *See* Telephone Interview with Ilana Rosenzweig, *supra* note 35 (Chicago auditor reviews but does not blindly rely on information developed during the course of litigation in her independent reviews).

cross-check the quality and thoroughness of the internal investigation and litigation discovery process. Similarly, when a department is looking for problem officers, units, and practices, a single meritless legal claim or an isolated civilian complaint will have little impact; the department will intervene only if it sees a cluster of incidents within a limited period of time.[187]

Departments also look beyond lawsuit data when crafting solutions to the problems they identify. When a cluster of incidents trigger early intervention, officials consider not only the officer's job performance but also his personal situation and family circumstances before deciding what course of action might prevent future problems.[188] Two case studies described by police practices expert Samuel Walker illustrate the personalized nature of these interventions.

> In one large police department, a police officer was flagged by the EI system because of a high number of use of force incidents. The counseling session with the officer revealed that she had a great fear of being struck in the face, and as a consequence was not properly taking control of encounters with citizens. After losing control with the person or persons, she would then have to use force to reassert control. Her supervisor referred her to the training unit, where she was instructed in tactics that would allow her to protect herself while maintaining control of encounters with the potential for conflict. As a result, her use of force incidents declined dramatically.
>
> In another large department, a patrol officer was identified by the EI system because of a series of use of force incidents. During the intervention session the officer's supervisor discovered that he was having severe personal financial problems. The supervisors recommended professional financial consulting, the officer followed this advice, and his performance improved significantly.[189]

As these descriptions show, a supervisor's expansive view of officers' problems may lead him to conclude that an officer needs training in self-defense tactics or financial counseling instead of discipline to reduce his uses of force.

Departments demonstrate similar circumspection when reviewing trends across cases. When the LASD's special counsel found one station was responsi-

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[187] *See supra* Parts I.C.1, 3 (describing trend analysis and early intervention systems).

[188] *See Protecting Civil Rights, supra* note 90 at 62 ("Understanding the critical factors, both on and off the job, will help supervisors decide when to intervene and to tailor needed interventions to individual officers' needs.")

[189] POLICE ACCOUNTABILITY, *supra* note 88 at 102.

ble for a disproportionate number of shootings and lawsuits, he spent several weeks at the station reviewing records, speaking with personnel, riding along with officers, and considering several possible reasons for the concentration of payouts.[190] Ultimately, many of his recommendations did not address the particular behaviors that prompted the lawsuits, but instead addressed hiring, management and training decisions at the station.[191]

Although departments' holistic review of information from multiple data sources mitigates the flaws of available data, it raises the costs of information gathering and analysis.[192] Reviewers bear the responsibility of separating the wheat from the chaff, the "good" from the "bad" information. Given cognitive limitations and heuristics, and the effects of information overload, we should expect analytical errors.[193] Officials may have trouble deciding what information is relevant.[194] Although the astute supervisor described by Samuel Walker thought to ask the officer with multiple uses of force about his financial situation,[195] finances might seem irrelevant to another competent supervisor trying to understand an officer's use of force statistics.

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[190] *See infra* notes 74-77 and accompanying text for a description of the investigation of the Century City Unit by the LASD auditor.

[191] *See supra* notes 78-80 and accompanying text for a description of the auditor's recommendations.

[192] There are not only information costs but also financial costs associated with departments' contextual analyses. Auditors charge cities and counties hundreds of thousands of dollars each year. *See* Correspondence with Merrick Bobb (June 14, 2009) (reporting that the LASD auditor charges the County of Los Angeles $200,000 per year for his services); Joel Warner, *supra* note 115 (reporting that Denver's auditor's budget is $636,000). Of course, not all of this money is spent reviewing lawsuit data. Police auditors are involved in multiple different efforts to improve police accountability, and do not charge piecemeal for their litigation review services.

[193] *See, e.g.*, HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATIONS (1947); Daniel G. Goldstein & Gerd Gigerenzer, *Models of Ecological Rationality: The Recognition Heuristic*, 109 PSYCHOL. REV. 75 (2002); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974).

[194] As James March observed, decisionmakers "often have relevant information but fail to see its relevance. They make unwarranted inferences from information, or fail to connect different parts of the information available to them to form a coherent interpretation." JAMES G. MARCH, A PRIMER ON DECISION MAKING 10 (1994). *See also* Diane Vaughn, *Rational Choice, Situated Action, and the Social Control of Organizations*, 32 LAW & SOCIETY REV. 23 (1998) (noting that "decisionmakers do not weigh all possible outcomes but instead rely on a few key values; the magnitude of possible bad outcomes in more salient, so that there is less risk taking when greater stakes are involved; in practice quantifying costs and benefits of a line of action is not easy").

[195] *See infra* note 189 and accompanying text.

Officials may also assess available information in a biased manner.[196] When supervisors use early intervention systems to design appropriate interventions, for example, they are instructed to look to the particular characteristics of the officer and the problems he faces.[197] Supervisors have broad authority to decide whether an officer should be counseled informally in the supervisor's office or reassigned to another station. The supervisor's personal dislike of that officer, or, conversely, his desire to protect one of his own may impact his decision about what course to take.

Departments attempt to limit error and bias by having both department personnel and external auditors evaluate available information.[198] Department personnel may run the early intervention system, for example, but the department's auditor will periodically review the department's collection and analysis of early intervention system data and the effectiveness of intervention decisions. With this dual review, departments reap the benefits of internal and external perspectives. Departments preserve the input of police officials, who have a deep understanding of the department and staff but may be biased by their relationship with the involved officers and stations.[199] Departments also benefit from the insights of external auditors, who know less about the inner-workings of the department but may be more objective.[200]

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[196] As sociologist Diane Vaughn has observed, "An extensive body of research and theory on decisionmaking in organizations shows that the weighing of costs and benefits does occur, but individual choice is constrained by institutional and organizational forces: decision practices and outcomes are products of compromise, limited information, external contingencies, retrospective sensemaking, unacknowledged cultural beliefs, political battles, and bureaucratic pathologies that undercut both the determination of goals and their achievement." Vaughn, *supra* note 194.

[197] *See generally Protecting Civil Rights*, *supra* note 90 at 44-78.

[198] The benefits of auditing and review have been recognized in multiple organizational contexts. *See, e.g.*, Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (And Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 122 (1997) (recognizing the benefits of auditing and review in corporate data-gathering and analysis); Ronal W. Serpas & Matthew Morley, *The Next Step in Accountability Driven Leadership: "CompStating" the CompStat Data*, POLICE CHIEF, May 2008, available at: http://www.policechiefmagazine.org.

[199] For the potential for biased information in a variety of institutional contexts *see, e.g.*, Barbara E. Armacost, *Organizational Culture and Police* Misconduct, 72 GEO. WASH. L. REV. 453 (2004); Jane E. Dutton et al., *Reading the Wind: How Middle Managers Assess the Context for Selling Issues to Top Managers*, 18 STRATEGIC MGMT. J. 407 (1997); R. Joseph Monsen Jr. & Anthony Downs, *A Theory of Large Managerial Firms*, 73 J. POL. ECON. 221 (1965).

[200] Although auditors may be more objective than department personnel, they are still human; auditors' decisions will be impacted by errors and biases, including possible biases toward their department employers. *See generally* Robert A. Prentice, *The Case of*

B. The Inaccuracies of Litigation Outcomes

Like claims and facts developed during litigation, litigation outcomes can be inaccurate. Plaintiffs with strong claims may lose at trial or have their case dismissed by the court.[201] Plaintiffs with weak claims may prevail. The amount awarded to a prevailing plaintiff can have little to do with the merits of the claim or the severity of the defendant's misconduct. Juries may award damages based on the severity of the plaintiff's injury[202] and characteristics of the plaintiff including how much she earns, where she lives, and whether she has dependents.[203] Jury verdicts may be skewed by negative public sentiment about a party to the litigation,[204] the depth of the defendants' pockets,[205] and trial participants'

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the Irrational Auditor: A Behavioral Insight into Securities Fraud Litigation, 95 NORTHWESTERN U. L. REV. 133 (2000).

[201] *See* Carl B. Klockars, *A Theory of Excessive Force and Its Control*, *in* POLICE VIOLENCE (William A. Geller & Hans Toch) (1996) at 6-7 (describing legal requirements in civil rights actions and observing that "police can engage in all sorts of objectionable behavior without transgressing criminal or civil definitions of excessive force"). *See also* Levinson, *supra* note 25 at 372-73 (noting that, even if a plaintiff's constitutional rights have been violated, they cannot be awarded damages absent injury).

[202] *See, e.g.*, David A. Hyman, *Medical Malpractice: What Do We Know and What (If Anything) Should We Do About It?*, 80 TEX. L. REV. 1639, 1642 (2002) (describing studies in multiple contexts that have found that "the best predictor of the size of an award is the severity of disability, not whether there was negligence, or an adverse event"); Troyen A. Brennan, Colin M. Sox, Helen R. Burstin, *Relation between negligent adverse events and the outcomes of medical-malpractice litigation*, 335 N.E. J. MED. 1963 (1999); Randall R. Bovbjerg et al., *Juries and Justice: Are Malpractice and Other Personal Injuries Created Equal*, 54 LAW & CONTEMP. PROBS., Winter 1991 at 5 (showing that malpractice damage awards correlate to severity and duration of injury); Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991) (finding that awards are based more on the extent of plaintiff's injury than defendants' wrongdoing).

[203] It is, for example, more expensive for a defendant to harm an executive than it is to harm a factory worker. *See* Richard J. Pierce, Jr., *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281, 1292 (1980). It is more expensive for a defendant to harm a parent than it is to harm a child or person without dependents. *Id.* at 1293. It is more expensive to harm a person who lives in a city than it is to harm a person who lives in the country. Paula Danzon, *The Frequency and Severity of Medical Malpractice Claims*, 27 J. L. & ECON. 115, 143 (1984).

[204] *See, e.g.,* David M. Studdert, Michelle M. Mello & Troyen A. Brennan, *Medical Malpractice*, 350 N.E. J. MED. 283, 286 (2004).

[205] *See, e.g.*, Audrey Chin & Mark Peterson, *Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials?* (RAND 1985) (studying Chicago jury verdicts from 1960-1980 and finding that plaintiffs who had fallen in a corporate owned building recovered higher damages than those who had fallen in government owned and privately owned buildings).

courtroom demeanor.[206] Settlement awards may also be inaccurate reflections of defendants' misconduct. Even if a defendant is not at fault, he may nonetheless settle the claim for nuisance value to avoid the costs and risks of trial.[207] In other cases, settlement awards may be reached for amounts below the cost of the anticipated verdict.[208]

A department interested in reducing the costs of litigation should collect and assess litigation data regardless of the accuracy of the outcomes. After all, to reduce the costs of suits, one must understand what types of cases are brought and how all payouts – not just payouts in meritorious cases – can be reduced.

The imperfections of lawsuit outcomes do, however, warp the deterrent signal of damages actions.[209] Deterrence theory, in its strongest form, relies on the assumption that threatened or actual penalties will discourage future misbehavior so long as the costs of harm avoidance are lower than the costs of liability. And, generally speaking – though not always – the costs of liability are viewed in terms of the dollars spent to satisfy settlements and judgments.[210] So, the logic goes, the higher the expected or exacted damages, the greater the care that will be taken to prevent those sorts of injuries in the future. The lower the damages, the lower the care.

In order for tort law appropriately to incentivize actors, defendants' liability exposure must be equivalent to the value of the harms they cause. Only with this type of equity can lawsuits carry the appropriately calibrated deterrent signal:

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[206] *See, e.g.*, Stephen D. Sugarman, DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS, AND BUSINESS 38 (1989).

[207] For descriptions and discussions of so-called "nuisance value" suits, *see, e.g.*, Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849 (2004); David Rosenberg and Steven Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3 (1985); Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PENN. L. REV. 519 (1997).

[208] For discounts in settlements, *see* James Chelius, WORKPLACE SAFETY AND HEALTH: THE ROLE OF WORKERS' COMPENSATION 61 (1977); Donald Harris, COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY 318-19 (1984); Patricia M. Danzon, *The Medical Malpractice System: Facts and Reforms, in* THE EFFECTS OF LITIGATION ON HEALTH CARE COSTS 28, 30 (1985). *But see* James K. Hammit, AUTOMOBILE ACCIDENT COMPENSATION: PAYMENTS BY AUTO INSURERS 74 (1985) (automobile cases settled for approximately the same amounts that were recovered after trial, without a discount); Elizabeth M. King & James P. Smith, ECONOMIC LOSS AND COMPENSATION IN AVIATION ACCIDENTS 75 (1988) (finding that air crash cases that settled after a lawsuit was filed recovered 50% of actual losses, but cases that went to trial recovered only 44% of actual losses).

[209] For other critiques of lawsuits' deterrent effects *see* Schwartz *supra* note 13 at 1026-27.

[210] *But see supra* note 25 (describing possible non-financial "costs" of civil rights lawsuits).

> If injurers pay less than for the harm they cause, underdeterrence may result – that is, precautions may be inadequate, product prices may be too low, and risk-producing activities may be excessive. Conversely, if injurers are made to pay more than for the harm they cause, wasteful precautions may be taken, product prices may be inappropriately high, and risky but socially beneficial activities may be undesirably curtailed.[211]

Given what we know about litigation outcomes, litigation payouts are highly unlikely to equal the nature and severity of underlying harms. And the deterrent signal is further skewed in police misconduct cases, where officers are almost certain to be indemnified and judgments against departments come from city budgets, not police coffers.[212]

The departments in this study minimize concerns about the imperfections of litigation outcomes by not focusing exclusively – or primarily – on payouts. Departments do track litigation payouts, and may pay particular attention to cases with high settlements and judgments.[213] But departments also pay attention to allegations of misconduct in claims and lawsuits when they are first filed, and the information developed during the course of litigation. Departments enter lawsuit allegations into early intervention systems used to track problem officers.[214] Departments identify trends by looking at clusters of legal claims.[215] Departments investigate lawsuit claims when they are filed.[216] And departments review the evidence developed during the course of litigation for personnel, policy, and training implications.[217]

Because departments review lawsuits at the time they are filed, claims that are dismissed can still be the basis for personnel action. And because these

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[211] A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 873 (1998). *See also* Gary T. Schwartz, *Does Tort Law Deter?*, *supra* note 11 at 423 (noting that torts-and-economics scholarship "assume[s], at least implicitly, a one-to-one relationship between the incentives afforded by tort liability rules and the resulting conduct of real-world actors"); Margo Schlanger, *Second Best Damages Deterrence*, 55 DEPAUL L. REV. 517, 520 (2005-2006) (referring to this equity as the "identity principle"). *See also* Ciracolo v. City of New York, 216 F.3d 236, 243 (2d Cir. 2000) (Calabresi, J., concurring) ("unless approximately all the costs of the activity are borne by the actor . . . the actor will not be adequately deterred from undesirable activities").

[212] *See* Schwartz, *supra* note 13 at 1032-33.

[213] *See supra* note 74, 106 and accompanying text.

[214] *See supra* Part II.C.3 for a description of early intervention systems.

[215] *See supra* Part II.C.1 for a description of trend analysis.

[216] *See supra* Part II.C.2 for a description of investigations of legal claims.

[217] *See supra* Part II.C.4 for a description of closed case reviews.

departments are not guided solely by the size of payouts, a case settled for a small amount can still inspire policy change. A lawsuit will be included in a department's early intervention system and trend analysis whether the case was dismissed or went to trial, whether it settled for $5,000, or $500,000. Departments have, in fact, made policy changes even when the underlying claim settled for an insignificant amount. In one instance, a deputy from the K9 unit of the Los Angeles Sheriff's Department took his dog to a park for a walk and the dog bit a man. The department paid the man's medical costs and an additional small settlement. Even though the bite was accidental and the settlement was small, the K9 unit reviewed and changed its policies department-wide to prevent future similar events.[218] Conversely, lawsuits resulting in large judgments or settlements will not necessarily lead to personnel or policy changes if the department concludes that none are merited.[219]

C. The Slow Pace of Litigation

Some contend that lawsuits should play no role in performance improvement efforts because litigation travels at such a slow pace.[220] Given generous statute of limitations periods and extensive pretrial litigation practices, a settlement or judgment may not be entered until several years after the underlying incident.

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[218] OFFICE OF INDEP. REVIEW, COUNTY OF L.A., SEVENTH ANNUAL REPORT 17 (2009), *available at* http://www.laoir.com/reports/SeventhAnnualRept.pdf

[219] *See, e.g.* Los Angeles County Board of Supervisors, Information on Proposed Settlement of Litigation, Montoya v. County of Los Angeles (Nov. 28, 2005) (finding no personnel or policy failures in lawsuit, settled for $150,000, in which plaintiff was shot in the abdomen after a struggle with sheriff's deputy), available at http://file.lacounty.gov/bos/supdocs/36736.pdf; Los Angeles County Board of Supervisors, Information on Proposed Settlement of Litigation, Eichenlaub v. County of Los Angeles (Jan. 21, 2009) (finding no personnel or policy failures in lawsuit, settled for $450,000, claiming excessive force and wrongful death).

[220] *See supra* note 178. The effects of the delay on the impact of litigation have been recognized in other contexts as well. *See, e.g.*, PAUL C. WEILER, A MEASURE OF MALPRACTICE 81 (1993) ("Consider, for example, and anesthetist who is momentarily distracted from indicators of oxygen deprivation to the patient and omits the necessary emergency response. The prospect of a tort suit arising years later as a result of a problem the doctor is too distracted even to be thinking about during the treatment in question will not likely provide him with motivation to adopt the proper precautions"); John Siliciano, *Corporate Behavior and the Social Efficiency of Tort Law*, 85 MICH. L. REV. 1821, 1830-31 (1986) ("In the products liability context, "some risks from a product may not be discovered until long after it has entered the marketplace. These 'remote' risks pose a particularly difficult dilemma for the manufacturer. The manufacturer could engage in an extensive research and testing program aimed at uncovering all suck risks, but at some point the costs and delay involved in such a program become prohibitive").

Officials in the departments in this study recognize that lawsuits are a "'trailing' rather than a leading indicator" that "may not be concluded until several years after the conduct that gave rise to the lawsuit."[221] However, departments do not wait until cases are resolved to evaluate the claims for possible lessons. Instead, departments track and analyze lawsuits from the time that the suits are filed.[222] As the Portland police departments' safety and risk officer reported, "We're watching these claims from Day One. We don't want to wait until after a large settlement."[223] By paying attention to lawsuits when they are first filed, departments lessen the inevitable delays of litigation, although they of course cannot eliminate some of the delay, including delays in filing.

Moreover, closed litigation files can be a source of valuable information even though the underlying events have occurred years before. Lawsuits have revealed information about misconduct allegations that did not arise during the internal investigation of the same incident. It was plaintiff's attorney – not internal investigators – who enhanced the audio portion of a videotape taken of the involved Portland transit division officers on the night of James Chasse's death.[224] By comparing closed litigation files with internal investigations, reviewers have identified weaknesses, flaws, biases, and gaps in internal investigation processes and ways that those internal processes can be improved.[225] Given the documented inadequacies of internal investigations and the vigorous nature of discovery, it should be no surprise that litigation files – when reviewed – have supplemented departments' knowledge and understanding of incidents and department practices despite the passage of time.

D. The Individualistic Focus of Litigation

A fourth critique of lawsuits' role in performance improvement – raised by scholars, not police executives – is that damages actions are generally focused on individual bad actors instead of systemic causes of harm. Organizational theory literature posits that organizational culture influences the behavior of individuals in that organization.[226] And those who study the police have long

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[221] MERRICK J. BOBB ET AL., L.A. COUNTY SHERIFF'S DEP'T, FIFTH SEMI-ANNUAL REPORT 29 (1996).

[222] *See supra* Part II.C.3 (describing early intervention systems and trend analyses).

[223] Bernstein, *supra* note 65.

[224] *See supra* notes 171-177 and accompanying text (describing Chasse case and investigation).

[225] *See supra* Part II.B (describing benefits of closed claim reviews).

[226] For scholarship describing the effects of organization on behavior *see generally* V. Lee Hamilton & Joseph Sanders, *Responsibility and Risk in Organizational Crimes*

observed that police organizational culture influences the actions of individual officers.[227] Scholars including Barbara Armacost, David Rudovsky, and Peter Schuck argue that lawsuits brought against individual officers focus too narrowly on officer error instead of the systemic causes of police misconduct.[228] They recommend bringing suits against the department to incentivize change at the organizational level.[229]

Although these scholars may correctly suggest that lawsuits are largely focused on individual behavior, litigation analysis nevertheless can uncover systemic problems. Departments address concerns about the overly individualistic nature of damages actions by reviewing individual cases for large-scale lessons. As a result, a single case brought against the LASD's K9 unit and settled for a modest sum can nonetheless lead to institution-wide policy reforms.[230] Departments also mitigate the individualistic focus of litigation by consolidating information from individual suits. Take, for example, the cluster of claims against the LASD by inmates who fell off their top bunks.[231] A supervisor reviewing a single claim might see a simple fall. By reviewing claims in the aggregate, LASD's risk manager could see that the department was improperly maintaining and communicating medical information – a systemic problem – even though the suits were focused on individual officers and events.

E. The Blaming Culture Created by Litigation

Some level criticism not at lawsuits themselves, but instead at the defensive culture created by the threat of being sued. In multiple industries, including aviation, manufacturing, nuclear power, and medical care, information about past performance is gathered and analyzed as a way of identifying the types of problems that lead to accidents.[232] Reporting systems collect information about

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of Obedience, 14 RES. ORG. BEHAV. 49 (1992); David Luban, *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2348 (1992).

[227] *See, e.g.*, James Q. Wilson, VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES (1978); Michael K. Brown, Working the Street: Police Discretion and the Dilemmas of Reform (1981); Jerome H. Skolnick & James J. Fyfe, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE (1993); Robert W. Worden, *The Causes of Police Brutality*, in POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE USES OF FORCE (William A. Geller & Hans Toch eds., 1996).

[228] *See, e.g.*, Armacost, *supra* note 199; Rudovsky, *supra* note 143; SCHUCK, *supra* note 25.

[229] *See id.* For similar arguments in the medical malpractice context, *see* WEILER, *supra* note 220; Mello & Brennan, *supra* note 204 at 1623-24.

[230] *See supra* note 218 and accompanying text.

[231] *See supra* note 66 and accompanying text.

[232] *See, e.g.*, Bryan A. Liang, *Error in Medicine: Legal Impediments to U.S.* Reform, 24 J. HEALTH POLITICS, POL'Y & L. 27, 29-31 (1999); Tom Kontogiannis & Strathis

accidents and "near misses," and officials analyze the data to identify system-wide problems that could cause future harms. And when accidents do occur, in-depth reviews are conducted to understand the root causes of error. The departments in this study – much like airliners, hospitals, and nuclear power plants – review information from a variety of sources to identify weaknesses and possible ways to improve. Police department early intervention systems – like near-miss reporting systems – gather information from multiple sources as a way of identifying problem officers, units, and practices. Police department closed claims reviews – like root cause analyses – sift through all available information about an incident as a way of diagnosing what went wrong.

Although lawsuits play an important role in police department policies, scholars generally view suits to be counter-productive to error reducing efforts. The concern, most frequently articulated in the health care context, is that safety improvements require "an organizational culture of openness to discovery and discussion of problems" that will be stifled by the threat of discipline and liability.[233]

My research supports the concern that litigation can undermine efforts to understand error. In my research, I found that the threat of litigation and discipline caused government personnel – including, at times, personnel in the five departments in this study – to hide or misrepresent the kinds of information

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Malkis, *A Proactive Approach to Human Error Detection and Identification in Aviation and Air Traffic Control,* 47 SAFETY SCIENCE 693 (2009); J. Bryan Sezton, Eric J. Thomas & Robert L. Helmreich, *Error, Stress, and Teamwork in Medicine and Aviation: Cross Sectional Surveys*, 320 BRITISH MED. J. 745 (2000); Paul Barach & Stephen D. Small, *Reporting and Preventing Medical Mishaps: Lessons from Non-Medical Near Miss Reporting Systems*, 320 BRITISH MED. J. 759 (2000) (describing "near-miss" reporting systems in aviation, petrochemical processing, steel production, and nuclear power).

[233] Randall R. Bovbjerg, Robert H. Miller & David W. Shapiro, *Paths to Reducing Medical Injury: Professional Liability and Discipline v. Patient Safety – and the Need for a Third Way*, 29 J.L. MED. & ETHICS 369, 374 (2001) *See also supra* note 15. William M. Sage, *How Litigation Relates to Health Care Regulation*, 28 J. HEALTH POLITICS, POL'Y & L. 387, 407 (2003) ("Patient safety advocates believe that fear of litigation discourages voluntary reporting of near-misses by physicians and compromises efforts to ascertain root causes of medical errors."); Bryan A. Liang, *Error in Medicine: Legal Impediments to U.S.* Reform, 24 J. HEALTH POLITICS, POL'Y & L. 27, 39 (1999) ("physicians with tort liability concerns may be hesitant to report adverse events and medical errors for fear that plaintiffs' attorneys will have access to this information, thus exposing physicians to liability"). Similar concerns have also been raised in the police context. *See* Douglas W. Perez & William Ker Muir, *Administrative Review of Alleged Brutality*, in POLICE VIOLENCE (William A. Geller & Hans Toch, eds.) at 231-32. *But see* David A. Hyman & Charles Silver, *The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem of Part of the Solution?* 90 CORNELL L. REV. 893 (2005) (finding that "there is no foundation for the widely held belief that fear of malpractice liability impedes efforts to improve the reliability of health care delivery systems).

crucial to performance improvement efforts.[234] Department officials have written reports that omit information harmful to their officers.[235] City attorneys have refused to disclose information about pending claims.[236] And internal affairs bureaus have suspended investigations while lawsuits are pending for fear that internal findings will compromise the defense of the case.[237] Indeed, the internal investigation of James Chasse's death was delayed by twenty-two months because the lawyer representing the county deputy did not allow department investigators to interview the deputy or others involved until they were deposed in the lawsuit.[238] The attorney was afraid that statements made in the internal investigation could compromise the defense of the civil case.[239]

Although the fear of litigation can inhibit data collection, the departments in this study show that lawsuits are also an important source of information about error. Suits have revealed incidents of misconduct, and evidence generated during litigation has offered critical details about those misconduct allegations. How have departments learned from lawsuits even as suits inhibit disclosure of error and open dialogue? Key to these departments' success appears to be the independent personnel who review department practices.[240] In each of these departments, auditors or investigators have unfettered access to department documents and personnel. This access has allowed them to learn that officials were not complying with their obligations to disclose or investigate.[241] Reviewers are also able to evaluate, in subsequent reports, whether those problems have been remedied. Although auditors and investigators do not eliminate problems in the collection and analysis of data, they have been able to point out and assist in the correction of data collection problems that would have gone unidentified but for the oustide review.[242]

IV. LEARNING FROM LAWSUITS: A DESCRIPTIVE THEORY

Lawsuits are widely recognized to compensate and deter; this Article shows suits can also inform. In the departments in this study, lawsuits reveal allegations of misconduct that officials investigate and consider with other data

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[234] *See* Schwartz, *supra* note 13 at Part II.D for a description of these types of implementation problems.
[235] *See* LASD FIFTEENTH SEMI-ANNUAL REPORT, *supra* note 76 at 53.
[236] *See* Schwartz, *supra* note 13 at 1065-66.
[237] *See id.* at 1064.
[238] *Chasse Report, supra* note 20 at 27-28.
[239] *See id.*
[240] *See supra* note 198.
[241] *See generally* Schwartz *supra* note 13 at Part II.D.
[242] For examples, *see id.* at 1063-64.

for possible trends. The evidence developed in discovery and trial offers a detailed picture of underlying events that can help identify personnel and policy failures. Closed case files, compared with internal investigations, reveal weaknesses in internal procedures. And trends in settlements and judgments, like initial claim trends, highlight units that officials should more carefully review. Viewed in isolation or in conjunction with other data, lawsuits offer insights about the incidence and causes of individual and organizational failings. And armed with these insights, departments find ways to improve.

This view of litigation – as a source of information that can be used to identify and reduce harm and error – parts company with prevailing understandings of lawsuits' role in organizational performance improvement. In the standard story, lawsuits' financial costs are expected to deter misbehavior.[243] Others contend that police officials will be deterred by lawsuits only when the suits jeopardize political capital, bureaucratic and administrative needs, or crime control efforts.[244] But all expect that it is lawsuits' punitive effects that inspire performance improvement.

High profile and costly cases can, most certainly, affect change in law enforcement. Indeed, several of the departments in this study began reviewing lawsuit data as a response to significant political and financial pressures.[245] But

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[243] *See, e.g.*, City of Monterey v. Del Monte Dunes, 526 U.S. 687, 727 (1999) (Scalia, J., concurring) (writing that Section 1983 "is designed to provide compensation for injuries arising from the violation of legal duties and thereby, of course, to deter future violations" (citation omitted); City of Riverside v. Rivera, 477 U.S. 561, 575 (1986) ("[T]he damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations . . . ."); Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 307 (1986) ("[D]eterrence . . . operates through the mechanism of damages that are compensatory"). For scholarly discussions of lawsuits as a financial deterrent, *see, e.g.*, Fallon & Meltzer, *supra* note 25. Some have, however, noted that other types of pressures associated with lawsuits can influence behavior. Myriam Gilles has pointed out that information revealed during litigation, press attention, and the symbolic power of judgment can have a deterrent effect. *See* Gilles, *supra* note 25. Several have also pointed out that individual officers may be deterred by the stresses of defending oneself, *see, e.g.*, Bogan v. Scott-Harris, 523 U.S. 44, 54 (1998); Gilles, *supra* note 25854-55 (2001); John. C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 50-51 (1998).

[244] *See* SCHUCK, *supra* note 25 at 125 (arguing that government officials may tolerate officer misconduct to further "goals such as crime control, intelligence-gathering, or preservation of neighborhood schools," "[b]ureaucratic needs," and "[a]dministrative imperatives"); Armacost, *supra* note 199 at 475 (arguing that officials may tolerate police misconduct that reduces crime); Levinson, *supra* note 25 (arguing that "[g]overnment actors respond to political incentives, not *financial* ones").

[245] *See* KOLTS COMMISSION REPORT, *supra* note 36 at 1 (noting that the Kolts Commission investigation of the LASD was prompted by "an increase over the past years in the number of officer-involved shootings," "four controversial shootings of minorities by LASD deputies in August 1991," and a front-page *L.A. Times* story that "Los Angeles

these departments do not limit their attention to cases that garner high payouts or press attention. Instead, they gather information about legal claims, evidence, and dispositions of all cases, even those without financial and political ramifications.

Deterrence theory also imagines that officials deciding which course of action to take weigh the costs of litigation against the benefits of the underlying conduct.[246] But the policies in place in the departments in this study do not facilitate this sort of weighing. Departments would not, for example, track lawsuits alleging chokeholds and then decide whether to retrain their officers about the impropriety of chokeholds based on the costs of these suits.[247] Instead, departments in this study would use lawsuits, with other data, to identify chokeholds as behavior that triggered a concentration of suits, civilian complaints, and/or use-of-force reports. The department then would conduct an investigation and identify ways to address the underlying policy, training, or personnel problems. And when a department looks for trends in payouts, officials do not weigh those judgments and settlements against the costs of potential policy changes. Instead, the concentration of settlements and judgments is treated as an indication of an underlying problem that is then investigated and analyzed.

In differentiating department practices from deterrence models, I do not mean to suggest that these departments never engage in cost-benefit analysis. Indeed, department officials likely weigh the costs and benefits of their actions at multiple points during information gathering, analysis, and decisionmaking. When LASD's Century Station was identified as having a high concentration of payouts, department officials likely considered the bureaucratic and administrative costs of focusing public attention on that station when deciding what course of action to pursue.[248] When Portland's auditor identified a number of incidents suggesting that officers did not understand their authority to enter a home without a warrant, department officials likely weighed the financial costs of various interventions before deciding to make a training video that clarified officers' legal

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County had paid $32 million in claims arising from the operation of the LASD over the last four years."); Jim Brunner, *New System in Place for Policing the Police*, SEATTLE TIMES (May 7, 2002) (describing the scandal, in which a homicide detective stole $10,000 from the home of a dead man, and at least eighteen police officials knew of the incident but no internal investigation ever took place); Libby Sander, *Chicago Revamps Investigation of Police Abuse, but Privacy Fight Continues*, N.Y. TIMES (July 20, 2007) (describing the "string of scandals" as follows: "An off-duty officer was caught on videotape beating a female bartender. In another incident, also captured on videotape, a group of off-duty officers was seen beating four businessmen at a downtown bar. In addition, several officers in an elite unit are awaiting trial on charges that include home invasion, theft and armed violence, as county prosecutors continue to investigate the unit.")

[246] *See supra* notes 24-25 for representative scholarship in this area.

[247] This is the type of weighing assumed in many accounts of law enforcement decisionmaking, even as scholars differ about the precise incentives that guide those decisions. *See, e.g.*, Levinson, *supra* note 25.

[248] *See supra* note 75 and accompanying text.

obligations.[249] This type of cost-benefit analysis is far more nuanced and complex than is suggested by formal models of deterrence. And lawsuits' role in this cost-benefit analysis is not as a "cost" but, instead, as one of many sources of information.

Others have recognized that information generated by litigation can serve a regulatory function. Lawsuits challenging the gun industry, clergy sexual abuse, tobacco, and breast implant manufacturers have generated information that supplemented regulatory efforts.[250] The revelation of damaging information can also pressure police departments to change their behavior.[251] In these contexts, the public disclosure of litigation data caused third parties to influence organizations to improve. The departments in this study reveal that litigation can also generate information previously unavailable to the very entity that is sued.

Although these departments view lawsuits as a valuable source of information, they recognize that the information is flawed.[252] Information produced internally – through civilian complaints and use of force reports – is flawed as well.[253] The approach of the departments in this study is not to ignore information because of its imperfections, but instead to review data from multiple sources with the hopes that imperfections will be minimized by a holistic approach. The Los Angeles Sheriff's Department's policies "consciously were fashioned to create multiple, new, and even redundant sources of information."[254]

> The same force incident that gave rise to a citizen's complaint might also give rise to a claim, a lawsuit, an IA rollout, a determination by a Commander's Panel on use of force, an administrative inquiry, and possibly even a criminal investigation. Each of the foregoing would give the Department an independent opportunity to bring facts about a particular incident to light, albeit at different times and at different stages of various proceedings and from different perspectives.[255]

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[249] *See supra* note 72 and accompanying text.

[250] *See, e.g.*, Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837 (2007); Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L. J. 693 (2007)

[251] *See, e.g.*, Gilles, *supra* note 25.

[252] *See supra* Part III.

[253] *See supra* Part II.

[254] LASD FIFTEENTH SEMI-ANNUAL REPORT, *supra* note 76 at 81.

[255] LASD FIFTH SEMI-ANNUAL REPORT, *supra* note 221 at 84.

By collecting information generated through multiple avenues, at different times, and from different perspectives, officials can account for imperfections in the data and thereby better understand department practices.

What can be learned from litigation – and how best to use the data – are questions that can be asked not only in police departments but also in other institutional settings. Although lawsuit data fill significant gaps in the information available to police departments, the value of lawsuit data to other organizations will depend on the quality and availability of alternative sources of information. Lawsuits may, for example, be less helpful in efforts to understand and improve aviation safety. The Federal Aviation Administration's reporting system captures thousands of errors and "near misses," events that could have but did not result in an airplane crash.[256] Granted, employees may decide not to report incidents for any number of reasons.[257] But lawsuits will not fill these reporting gaps. People are unlikely to file lawsuits regarding near misses – airplanes flying too close together or approaching a runway too quickly – as they do not result in injury. The kinds of error that typically lead to lawsuits – airplane crashes – are catastrophic and highly visible, and will come to the attention of officials whether or not an internal report is filed.[258]

Discovery also likely reveals little about the details of aviation accidents. When a plane crashes, the National Transportation Safety Board investigates the circumstances of the crash.[259] Despite its sterling reputation, the NTSB has its flaws. In a recent study, the RAND Corporation found that the NTSB's investigations are compromised by underfunding, understaffing, and outdated investigatory techniques.[260] Airplane staff, air traffic controllers, and other potential defendants participate in these investigations but the victims and their families do not, raising the appearance of – and potential for – bias.[261] Litigation may not, however, fill

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[256] *See* Alan Levin, *FAA Error-Reporting Program Reveals Hazards, Yields Fixes*, USA TODAY (Apr. 5, 2010).

[257] *See, e.g.*, *Investigation Reveals Underrerporting of Airplane Near Misses at Dallas Fort Worth*, ASSOCIATED PRESS (Jan. 12, 2011).

[258] People sue for less serious accidents and injuries, as well. *See, e.g.*, Jennifer Sullivan, *Alaska Airlines Flight Attendants File Claim over Air Turbulence Injuries*, Seattle Times (Dec. 18, 2009); Jessica Ravitz, *Toxic Plane Air Sickens Flight Attendant, Suit Says*, CNN (July 10, 2009). This Article is not meant definitively to account for the types of claims brought in lawsuits – more study is necessary to understand the types of claims brought in lawsuits and reported internally. *See* the Conclusion for this and other research questions prompted by this Article.

[259] RAND, Safety in the Skies xxviii (2000).

[260] *See id.*

[261] *See id.* at xiv (noting that the reliability of NTSB investigations are compromised by the fact that "the parties most likely to be named to assist in the investigation are also likely to be named defendants in related civil litigation. This inherent conflict of interest may jeopardize, or be perceived to jeopardize, the integrity of the NTSB investigation.")

the gaps in NTSB investigations because their final accident reports "figure prominently in litigation" and are considered by all parties to be "road maps to liability."[262]

The value of lawsuits to hospitals' patient safety efforts may fall somewhere between law enforcement and aviation. Hospitals have developed sophisticated error-reporting systems similar to those used in aviation.[263] Doctors, nurses, and other hospital staff are encouraged to input information about errors and near misses when they occur. Hospital employees, like airline employees, under-report error.[264] Yet malpractice cases, unlike aviation suits, appear to fill gaps in hospital reporting systems.[265] This distinction may be explained by differences in the types of error that occur in each setting. An airplane crash is highly visible and requires no internal report to prompt the NTSB's investigation. In contrast, if a doctor has improperly diagnosed a patient, neither the doctor nor the patient will know to report the error. The patient may only learn of the improper diagnosis after many years and consultations with many doctors.[266] And

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[262] *Id.* at 30.

[263] The Joint Commission (previously the Joint Commission on Accreditation of Healthcare Organizations) requires every accredited hospital to have a policy for reporting, investigating, and responding to "sentinel events." *See* Joint Commission, Sentinel Event Policy and Procedures (updated Jan. 4 2011), available at http://www.jointcommission.org/Sentinel_Event_Policy_and_Procedures/. Federal and state laws also require hospitals to gather and report information about error. *See* William M. Sage, Joshua Graff Zivin & Nathaniel B. Chase, *Bridging the Relational-Regulatory Gap: A Pragmatic Information Policy for Patient Safety and Medical Malpractice,* 59 Vanderbilt L. Rev. 1263, 1280-91 (2006). Hospital staff also internally report and discuss error in morbidity and mortality conferences. *See* Jay D. Orlander, Thomas W. Barber & B. Graeme Fincke, *The Morbidity and Mortality Conference: The Delicate Nature of Learning from Error*, 77 Acad. Med. 1101 (2002).

[264] For studies of the incidence and causes of patient error underreporting *see, e.g.*, Donna Beth Jeffe, William C. Dunagan, Jane M. Garbutt & Victoria J. Fraser, *Using Focus Groups to Understand Physicians' and Nurses' Perspectives on Error Reporting in Hospitals*, 30 JOINT COMM'N J. ON QUALITY AND SAFETY 471 (2004); C.L. Uribe, S.B. Schweikhart, D.S. Pathak, G.B. Marsh & R.R. Fraley, *Perceived Barriers to Medical-Error Reporting: An Exploratory Investigation*, 47 J. HEALTHCARE MGMT. 263 (2002); D.S. Wakefield, B.J. Wakefield, T. Uden-Holman, T. Borders, M. Blegen & T. Vaughn, *Understanding Why Medication Administration Errors May Not Be Reported*, 14VAMERICAN J. MED. QUALITY 81 (1999).

[265] In a recent study, researchers collected data from different avenues; "an incident reporting system, reports to hospital risk management, a patient complaints database, executive walk rounds, and malpractice claims." Researchers found that each information source produced different data: "[w]ith a few exceptions, there was little correlation between the findings of the individual systems." *See* Osnat Levtzion-Korac, et al., *Integrating Incident Data from Five Reporting Systems to Assess Patient Safety: Making Sense of the Elephant*, 36 JOINT COMM'N J. ON Q. & PATIENT SAFETY 402 (2010).

[266] *Id.*

the doctor may first learn of the incident when he is served with a summons and complaint.

The discovery process may also offer insight about the nature and causes of medical error. Although hospitals extensively document patient procedures, the litigation process has nonetheless been found to offer more detailed information than charts and medical reports.[267] Researchers prefer medical malpractice claims files over medical files when studying error because, "by drawing together documentation from both formal legal documents, such as depositions and interrogatories, and confidential internal investigations, claim files present a substantially richer body of information about the antecedents of medical injury than the medical record alone."[268]

Every organization receives information from a combination of internal and external sources. What role lawsuits can play in performance improvement efforts will depend on the characteristics of error, alternative available information, and litigation practice in that industry. It is safe to assume that, in every institutional setting, all information sources will be flawed in some manner. Yet this Article reveals that collecting information from multiple complementary sources can mitigate flaws in the data and enhance understanding. As Kathryn Olson, the director of Seattle's OPA, described, lawsuits – like civilian complaints, use-of-force reports, and other internally generated data – are a "foggy lens through which to view agency improvement."[269] The departments in this study have shown that several foggy lenses, viewed together, can reveal a clearer picture of institutional performance.

CONCLUSION

Despite widespread reluctance to pay attention to litigation data, law enforcement agencies can – and do – learn from lawsuits. Department practices take advantage of information in lawsuits that is unavailable through other sources. And although lawsuit data is imperfect, practices in these departments minimize decisionmakers' reliance on those aspects of the data most prone to error. In illuminating police department practices and recognizing lawsuits' role in and value to performance improvement efforts, this Article ventures into largely uncharted territory. More study could refine thoughts about how best to learn

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[267] *See* Lindgren et al., *Medical Malpractice Risk Management Early Warning Systems,* 54 LAW & CONTEMP. PROBS. 23, 25 (1991) (discussing the problems with relying on charts and medical reports).

[268] Selwyn O. Rogers, Jr., Atul A. Gawande, Mary Kwaan, Ann Louise Puopolo, Catherine Yoon, Troyen A. Brennan & David M. Studdert, *Analysis of Surgical Errors in Closed Malpractice Claims at 4 Liability Insurers*, 140 SURGERY 25 (2006).

[269] *See* Telephone Interview with Kathryn Olson, *supra* note 35 (referencing a paper given by an official in the Eugene, Oregon police department).

from litigation and the ideal role of litigation data in organizational decisionmaking. So I end with a familiar call for further research.

First, more can be done to understand the value of lawsuit data to police departments. I have shown that lawsuits – while flawed sources of information – may fill gaps in civilian complaint and use-of-force reporting systems. Further research could quantify the degree of overlap between these information sources by evaluating the types of information departments receive through civilian complaints, use-of-force reports, notices of claim, and lawsuits. Research could also compare the comprehensiveness of internal investigations and lawsuit files. Further information about the uniqueness (or redundancy) of lawsuit data would assist those thinking seriously about the role that lawsuits should play in early intervention systems, trend analyses, internal investigations, and policy reviews.

More can also be learned about the relationship between the merits of civil rights lawsuits and their dispositions. Scholars have studied the volume of civil rights cases and the frequency with which plaintiffs prevail in court and cases settle.[270] Some scholars have also reviewed civil rights case descriptions and files, concluding that assertions of widespread frivolous claims are overblown.[271] But there have been no studies of the frequency with which victims of civil rights

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[270] *See, e.g.*, Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482 (1982) [hereinafter Eisenberg, *Section 1983*] (studying filing rates and outcomes of Section 1983 cases in the Central District of California); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987) (studying a larger sample of Section 1983 cases filed in the Central District of California). Several of the studies focus only on civil rights claims filed by inmates. *See, e.g.*, Darrell L. Ross, *Emerging Trends in Correctional Civil Liability Cases: A Content Analysis of Federal Court Decisions of Title 42 United States Code Section 1983: 1970-1994*, 25 J. CRIM. JUST. 501 (1997); William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610 (1979). These studies are generally focused on examining the extent to which civil rights actions have imposed a burden on the courts, as opposed to the underlying merits of the claims.

[271] *See, e.g.*, Eisenberg, *Section 1983*, *supra* note 270 at 538 (concluding, following a review of cases brought in Los Angeles, that "section 1983 cases usually involve important constitutional claims" and, "[a]s is true of nonprisoner cases, most prisoner section 1983 complaints were not plainly trivial assertions implicating little or no federal interest," but observing that "[t]he ultimate truth or falsity of allegations in section 1983 cases . . . is not yet a debated issue"); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1572 (2003) (concluding that the ten most often litigated issues "mostly concern real hardships inherent in prison life, not peanut butter"); Henry F. Fradella, *In Search of Meritorious Claims: A Study of the Processing of Prisoner Cases in a Federal District Court*, 21 JUST. SYS. J. 23 (1999) (finding that only 6 of 290 claims in 200 randomly selected cases were "factually absurd").

violations bring lawsuits,[272] the merits of civil rights cases that are brought,[273] or the correlation between findings of liability, damages awarded, and actual harms suffered by plaintiffs.[274] Medical malpractice cases and other types of tort claims have been scrutinized to determine the frequency with which wrongfully injured people sue, the frequency with which meritorious and frivolous claims succeed, and the amount of damages awarded.[275] This same research can be conducted regarding civil rights claims.

Studying the accuracy of civil rights lawsuits could further inform the ways that police departments should use litigation data. Currently, law enforcement agencies' evaluations of litigation data accommodate critiques that lawsuits both over-estimate and under-estimate the universe of harms. If, however, studies

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[272] *BJS 2002 Study*, *supra* note 123, estimated that less than one percent of people sue who believe police mistreated them. But we do not know how frequently people sue who, objective reviewers confirm, had their rights violated. There is no reliable data about the incidence of police misconduct that could be compared to lawsuits filed. For a description of the many gaps in our information about police uses of force, *see* Michael R. Smith, *Toward a National Use-Of-Force Data Collection System: One Small (and Focused) Step Is Better Than a Giant Leap*, 7 CRIMINOLOGY & PUB. POL'Y 619 (2008).

[273] Although the studies cited *supra* note 270 examine the frequency with which civil rights cases are dismissed, these studies do not evaluate whether the "right" outcome was reached – as do the medical malpractice claims studies described *infra* note 275.

[274] *See, e.g.*, Schlanger, *supra* note 271 at 1613-14 (2003) (observing that inmates with attorneys have a higher success rate than *pro se* inmates, but concluding that "without data there is really no way to know which effect dominates – the depression of success rates because lawyers are not available, or the absence of lawyers because the cases are not very good cases"). *See also* Victor E. Kappeler, Stephen F. Kappeler & Rolando V. del Carmen, *A Content Analysis of Police Civil Liability Cases: Decisions of the Federal District Courts, 1978-1990*, 21 J. CRIM. JUST. 325, 333 (1993)(finding that procedural safeguards cause defendants to win Section 1983 cases more often than they would if plaintiffs and defendants were on "equal footing" procedurally).

[275] For the frequency with which wrongfully injured people sue, *see supra* note 179. For the correlation between damages awarded and underlying harms, *see supra* note 202. For the frequency with which the "right" result occurs in medical malpractice cases, *see, e.g.,* David M. Studdert et al., *Claims, Errors and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024 (2006) (study of closed claim files found that the "right" result was reached about 73% of the time and finding that false negatives were 1.6 times more likely than false positives); Frank A. Sloan et al, SUING FOR MEDICAL MALPRACTICE 166-68 (1993) (finding correlation between actual outcomes of cases and independent evaluations of medical liability); Mark I. Taragin et al., *The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims*, 117 ANNALS INTERNAL MED. 780 (1992) (finding that payments in unmeritorious medical malpractice cases are rare); Henry S. Farber & Michelle White, *Medical Malpractice: An Empirical Examination of the Litigation Process*, 22 RAND. J. ECON. 199 (1991) (finding that negligence is an "extremely important determinant of defendants' medical malpractice liability").

showed that outcomes in these cases closely tracked objective evaluations of liability and harm, settlements could be considered more conclusive evidence of wrongdoing. And, of course, the opposite conclusion could be reached if study revealed little correlation between outcomes and the merits of the underlying claims.

Research can also tackle these same questions as they apply to other types of organizations. Lawsuits should now be understood as potential sources of information, but how useful is that information to other complex organizations? I have offered preliminary thoughts about the value of lawsuit data to aviation and hospital performance improvement efforts.[276] Further study can reveal the ways that these and other types of organizations actually gather and analyze information from lawsuits and the influence of their practices on our understanding of the relationship between litigation and performance improvement.

Finally, research could explore how procedural and evidentiary rules could be structured to encourage organizations to pay attention to lawsuits. Some reforms would ease the punitive effects of litigation and encourage freer discussion of error. Steps have been taken to protect quality improvement efforts from disclosure in health care and aviation.[277] Perhaps similar efforts should be made to protect law enforcement quality improvement efforts, as well. Other possible reforms – including limits on confidentiality provisions in settlement agreements – would make it easier for plaintiffs and advocates to gather and analyze information from lawsuits, and thereby pressure departments to pay attention. Reimagining the rules of evidence and procedure to prioritize the generation of information will likely result in perceived gains and losses for all sides. If re-imagined correctly, however, such changes could lead to overall reductions in claims and improvements in care.

This Article is one important step toward a better understanding of the relationship between lawsuits and organizational behavior. The policies used by the five departments in my study are promising and provocative ways to learn from lawsuits. And we, in turn, should learn more from and about them.

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[276] *See supra* notes 255-67 and accompanying text.

[277] *See* Steven Suydam, Bryan A. Liang, Storm Anderson & Matthew B. Weinger, *Patient Safety Data Sharing and Protection from Legal Discovery* in ADVANCES IN PATIENT SAFETY: FROM RESEARCH TO IMPLEMENTATION (Agency for Healthcare Research and Quality 2005) (describing existing discovery protections for patient safety efforts); Alan Levin, *FAA Error-Reporting Program Reveals Hazards, Yields Fixes*, USA TODAY (Apr. 5, 2010) (describing new FAA reporting program that provides immunity to reporters for all but the most serious lapses).